UNIVERSITY OF ILLINOIS LAW LIBRARY

THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 13 JUNE 1946 NUMBER 4

FEPC—A CASE HISTORY IN PARLIAMENTARY MANEUVER

WILL MASLOW*

NO OTHER legislative struggle in recent years has been the occasion for so many parliamentary maneuvers as the effort to create a statutory Fair Employment Practice Commission and to keep alive the President's Committee on Fair Employment Practice.[1] The bitterly-fought battle in which almost every weapon in the parliamentary arsenal has been used has now lasted almost four years and the end is not yet in sight. The recent filibuster which consumed eighteen meetings of the Senate was not the final, but merely the most recent, in a series of parliamentary moves. The resourceful parliamentarians on both sides of the issue have utilized such devices as points of order, discharge petitions, Calendar Wednesdays, blocking the appointment of conference committees, restrictions in appropriation acts, suspension of the rules, special orders of business, and breaking quorums. The conflict at one stage resulted in an impasse between Senate and House which temporarily cut off appropriations for the War agencies. The latest filibuster blocked Senate business for almost a month.

A discussion of the substantive merits of the FEPC is beyond the scope of this paper. The accounts in the press, and the extensive debates and hearings in Congress have revealed the bitterness which has accompanied this controversy. An account of the parliamentary history of FEPC, however, not only furnishes a graphic description of procedure in the Senate and House but also suggests the need for revision of certain parliamentary

* Director of the Commission on Law and Social Action of the American Jewish Congress and member of the New York Bar.

[1] Both the President's Committee and the proposed commission will be referred to herein as FEPC.

rules.[2] For the student and attorney trained to think in terms of judicial construction of legislative enactments this account may reveal a phase of "law-making" which has been given slight attention by legal commentators.

FEPC, 1941–1943

On June 25, 1941, President Roosevelt issued an unprecedented Executive Order, No. 8802, in which he "reaffirm[ed] the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, color, creed, or national origin" and declared that it was "the duty of employers and of labor organizations" to provide for the "full and equitable participation of all workers in defense industries, without discrimination." The order also created a non-salaried five-man "Committee on Fair Employment Practice," which was authorized to "receive and investigate complaints of discrimination" in violation of the order and to take "appropriate steps to redress valid grievances."[3]

The order was signed, it should be noted, almost six months before we entered the war but during the period of national emergency proclaimed after the downfall of France. The order recited that it was issued "by virtue of the authority vested in me by the Constitution and the statutes,

[2] House rules are published biennially in an annotated volume written by Lewis Deschler, House Parliamentarian, H.R. Doc. 810, 78th Cong. 2d Sess. (1945), referred to herein as "Deschler." House precedents have been collected, analyzed, and indexed in a treatise of eleven volumes, Cannon's Precedents of the House of Representatives of the United States (2d ed., 1936), the first five volumes being a reprint of an earlier collection known as Hind's Precedents (referred to herein as "Cannon's Precedents"). Cannon's Procedure in the House of Representatives, H.R. Doc. 675, 78th Cong. 2d Sess. (1944), is a compact, well-indexed and authoritative manual (referred to herein as "Cannon"). The Senate rules are published biennially in an unannotated manual prepared by the Senate Rules Committee, Sen. Doc. 225, 78th Cong. 2d Sess. (1944). The latest collection of Senate precedents is Gilfry, Precedents: Decisions on Points of Order in the United States Senate, 1789–1913, published by the direction of the Senate, Sen. Doc. 1123, 62d Cong. 3d Sess. (1914). The twelve-page pamphlet "Enactment of a Law," published by the Senate, Sen. Doc. 155, 73d Cong. 2d Sess. (1934), is an excellent summary. Points of order are likewise indexed in the yearly volumes of the Congressional Record and in the official Senate and House Journals. Among nonofficial treatises are Riddick, Congressional Procedure (1941); Haynes, The Senate of the United States (1941); see also the bibliography dated October 20, 1945, prepared by William R. Tansill of the Library of Congress for the Joint Committee on the Organization of Congress, 79th Cong. For law review material on Congressional procedure, see Wilson and Simpson, House Rules: Democratic Discipline, 30 Georgetown L. J. 763 (1942); Tilson, Parliamentary Law in Shaping Legislation, 15. Conn. B.J. 61 (1941); Pepper, Senate Cloture, 74 U. of Pa. L. Rev. 131 (1925); Fess, Importance of Parliamentary Law to the Legal Profession, 40 Chi. Leg. N. 297 (1908); 18 Mich. L. Rev. 343 (1920).

[3] Fed. Reg. Doc. 41–4544; 6 Fed. Reg. (Part 4) 3109 (1941). The committee was enlarged to six members by Executive Order 8823, dated July 18, 1941, and to seven members by Executive Order 9111, dated March 25, 1942.

and as a prerequisite to the successful conduct of our national defense production effort." Its issuance, however, was precipitated by the threat of Negro leaders, principally A. Phillip Randolph, President of the Brotherhood of Sleeping Car Porters, to stage an organized Negro "March on Washington."[4]

Shortly after the committee began operating, Vito Marcantonio (A.L.P.-N.Y.) on July 20, 1942, introduced a bill in the House designed to make the committee a permanent statutory administrative agency with power to issue orders enforceable in the courts, similar to that exercised by the National Labor Relations Board.[5] Sam Rayburn (Dem.-Tex.), Speaker of the House, instead of referring to the bill the appropriate—and liberal—Committee on Labor, referred it to the hostile Committee of the Judiciary, headed by Hatton W. Summers (Dem.-Tex.).[6] Rule XI, clause 22, of the House Rules provides that all bills relating to and "affecting labor" are to be referred to the Committee on Labor, whereas only bills relating to "judicial proceedings, civil and criminal law" are to be referred to the Committee on the Judiciary.[7] Since it is extremely difficult to compel a committee to report out a bill, referral to a hostile committee is the first and easiest method of killing it. Rep. Marcantonio's bill, accordingly, died in committee.

Meanwhile, the FEPC, in spite of its lack of powers and its inadequate

[4] On June 18, 1941, following a meeting with the Cabinet, President Roosevelt appointed Fiorello H. LaGuardia, then Mayor of New York and head of the Office of Civilian Defense, to confer with the leaders of the "March-on-Washington" movement. On June 24, Mayor LaGuardia and Aubrey Williams, Chief of the National Youth Administration, met with Randolph and three of his aides. LaGuardia submitted a draft of a proposed executive order to the Negro leaders and asked them to call off the "march." Following telephone conferences between Randolph and Walter White, Secretary of the National Association for the Advancement of Colored People, the draft was approved and the "march" called off. The next day, the executive order was signed. One stumbling block in this conference was the question whether the order could be made applicable to the federal government. It is significant that the original order on file in the archives of the United States shows that the phrase "or government" is an interlineation in the handwriting of President Roosevelt. Executive orders are drafted by the Bureau of the Budget. The account of the conference described in this note is based on a letter to the writer from one of the participants. See also Logan, What the Negro Wants 16, 145 (1944). Logan also participated in this conference.

[5] H.R. 7412, 77th Cong. 2d Sess. (1942). Rep. Marcantonio had introduced an earlier bill. H.R. 3994, 77th Cong. 1st. Sess., on March 13, 1941, forbidding discrimination by any federal agency or government contractor because of race, color, or creed. Sen. James M. Mead (Dem.-N.Y.) on February 9, 1942, also had introduced a bill, S.2256, 77th Cong. 2d Sess., forbidding such discrimination by government contractors.

[6] For the power of the Speaker of the House, see Chang-Wei, The Speaker of the House of Representatives since 1896 (1928).

[7] The subsequent FEPC bills, substantially similar to H.R. 7412, were referred to the House Committee on Labor.

staff,[8] initiated hearings in Los Angeles, Chicago, Birmingham, and New York, uncovering widespread patterns of discrimination against Negroes and Jews.[9] In January, 1943, the FEPC had scheduled an industry-wide hearing in which it prepared to examine the discriminatory practices of the railroads and railroad brotherhoods, particularly the conspiracy of the Southern roads and the Brotherhood of Locomotive Firemen to drive Negro firemen from the industry. Without notice, Paul McNutt, chairman of the commission, canceled the hearing.[10]

The FEPC began to disintegrate and once again Negro protests began to flood the White House. On May 27, 1943, President Roosevelt issued another executive order[11] abolishing the committee and establishing a new one in its place under the chairmanship of Msgr. Francis J. Haas.[12] The new order differed somewhat from the original one: it recited that it was issued by the President as "Commander in Chief of the Army and Navy"; it was made applicable to "war industries" instead of "defense industries"; it declared that all employers and labor organizations had the "duty" to eliminate not only discrimination in employment but also in "union membership"; it gave the FEPC virtual autonomy by establishing it as part of the "Executive Office of the President"; it specifically authorized the President's Committee to "conduct hearings and issue findings of fact"; and finally, instead of being limited to the redress of valid grievances, the FEPC was authorized to "take appropriate steps to obtain elimination" of the discrimination forbidden by the order.[13] The first task

[8] In January, 1942, the entire staff consisted of seven professional and five clerical employees. In May, 1943, there were thirteen professional and twenty-one clerical employees. At its peak in July, 1945, the staff consisted of about 120 persons.

[9] The decisions of the committee are reported in the War Manpower Reports of the Bureau of National Affairs, Washington, D.C., and likewise in the Labor Relations Reports of the same bureau.

[10] The committee was originally part of the Office of Production Management, the predecessor of the War Production Board. On July 30, 1942, it was transferred from that board to the War Manpower Commission.

[11] No. 9346, Fed. Reg. Doc. 43-8651, 8 Fed. Reg. (Part 5) 7183 (1943), amended by Executive Order, 9446, dated December 20, 1945.

[12] On October 18, 1943, Msgr. Haas, who had been appointed a Bishop, resigned, to be succeeded by his deputy, Malcolm Ross, the present chairman of the committee.

[13] In the interim, a new House of Representatives having been elected, Rep. Marcantonio on February 5, 1943, reintroduced his FEPC bill (H.R. 1732, 78th Cong. 1st Sess.) which was again consigned to the Judiciary Committee. The reintroduction of the bill was necessitated by the fact that the House of Representatives is not a continuous body, and therefore any bill which is not finally approved during the two-year lifetime of a Congress must be reintroduced de novo in the next Congress. Rep. Marcantonio made an unsuccessful effort to discharge the Judiciary Committee from further consideration of the bill (H. Res. 343, 78th Cong. 1st Sess., Nov. 4, 1943). The discharge procedure is discussed at p. 420, infra.

of the FEPC under its new leadership was to conduct the railroad hearing previously canceled. In addition, it began to enlarge its staff and to establish a series of field offices in a dozen cities.

This activity of the FEPC prompted an immediate congressional reaction. Congressional opponents of a government agency have three powerful weapons at their disposal: (1) they may by legislation kill the agency; (2) they may starve it to death by withholding necessary appropriations; or (3) they may attempt to "smear" it by a Congressional investigation. The first effort of the foes of FEPC was investigation by a congressional committee.

Howard W. Smith (Dem.-Va.), a member of the House Rules Committee and a powerful figure in the House, had early in the session obtained approval for his resolution creating a "Select Committee To Investigate Acts of Executive Agencies beyond the Scope of Their Authority"[14] and had been appointed its chairman. The FEPC was one of the first agencies the committee investigated. The first hearing involving the FEPC was held on January 11, 1944, for the purpose of examining the legal effect of a "directive" issued by the FEPC against the Philadelphia Rapid Transit Employees' Union. (The union whose members operated the rapid transit system of Philadelphia had refused to permit the upgrading of Negroes to positions as motormen, conductors, and other "platform" jobs.) On February 25, 1944, the Smith Committee heard union complaints about the practices of the War Shipping Administration, which, following the mandate of Executive Order 9346, was insisting that seamen be referred from its placement offices without discrimination because of race. The third hearing of the committee involving the FEPC was held on March 2, 1944, and concerned the directive issued by the FEPC following its railroad industry investigation. No report was ever issued by the Smith Committee on these hearings nor was any recommendation ever made to the House thereon, although from time to time during the course of the FEPC's struggle for Congressional approval, rumors were current that such a report would be issued.

1944 APPROPRIATION

The President's Committee was at this time spending at the rate of about $500,000 a year, allocated from the President's emergency war funds, Congress having appropriated scores of millions of dollars for the

[14] Pursuant to H. Res. 102, 78th Cong. 1st Sess. (1943).

President's unrestricted confidential war-time expenditures.[15] Congressional opponents of the FEPC now began to look askance at the President's wartime purse and, on February 23, 1944, Sen. Richard B. Russell (Dem.-Ga.), the ablest and most resourceful opponent of the FEPC, announced that he intended to prevent use of this money by the FEPC. He introduced an amendment to the independent offices appropriations bill[16] to forbid the use of *any* appropriation to pay the expenses of any agency created by executive order after such agency had been in existence for more than one year, unless Congress specifically authorized the expenditure of funds for it. On March 9, 1944, President Roosevelt transmitted to Congress a budget for the FEPC totaling $585,000, the committee's first request for a Congressional appropriation.[17] Fearful that the Russell amendment might immediately cut off all funds from the FEPC, Sen. Douglass Buck (Rep.-Del.) on March 22, 1944, introduced an amendment to the independent offices appropriation bill proposing the grant of $150,000 for the committee for the balance of the fiscal year, i.e., until June 30, 1944. On March 24, 1944, the debate on the Russell amendment began in the Senate. Joseph H. Ball (Rep.-Minn.) first proposed an amendment, which Sen. Russell accepted and which was adopted by a voice vote, making it clear that the Russell limitation would not apply until after June 30, 1944.[18] Thereupon Sen. Buck proposed another limitation to the original Russell amendment in these words: "except the Fair Employment Practice Committee." Sen. Buck's proviso was adopted 36 to 22 by roll-call vote.[19] Sen. Russell then attempted unsuccessfully to withdraw his entire amendment.[20] After further debate, Edwin C. Johnson

[15] See, for example, 55 Stat. 682 (1941) authorizing the expenditure of $2,500,000 on "unvouchered expenditures" and 55 Stat. 818 (1941) appropriating $10,000,000 for "objects of a confidential nature."

[16] H.R. 4070, 78th Cong. 2d Sess. (1944).

[17] H.R. Doc. 486, 78th Cong. 2d Sess. (1944). Many months prior to the introduction of the Russell amendment, the Budget Bureau had requested the FEPC to submit a detailed request for a Congressional appropriation.

[18] 90 Cong. Rec. 3059–60. (1944). References to the Congressional Record after June 30, 1945, are to the temporary or unbound edition. All other references are to the permanent bound edition.

[19] 90 Cong. Rec. 3062 (1944). Sen. Russell attempted unsuccessfully to prevent a roll-call vote, presumably to allow opponents of the Buck proviso to vote against it without having to account publicly for their vote. Article 1, section 5 of the Constitution of the United States provides that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal."

[20] A motion may not be withdrawn by the mover after it has been amended, Rule XXI, § 2.

(Rep.-Colo.) moved that the vote on the Buck proviso be reconsidered,[22] which was agreed to, 30 to 28. A third vote was then taken on the proviso, which was disapproved by a roll-call vote of 33 to 27. The Russell amendment was subsequently adopted[23] and the FEPC now had to look exclusively to Congress for its funds.

The real menace of the Russell amendment to the continued functioning of the FEPC was not apparent until later. On May 25, 1944, the House Appropriations Committee reported out an appropriation bill which carried an item of $500,000 for the FEPC,[24] only $85,000 less than President Roosevelt's request. A dramatic series of incidents then occurred which require some analysis. The Appropriations Committee of the House is one of its most powerful and most privileged units. Under the House rules, no general appropriation of any sort may be reported by any committee except the Appropriations Committee. Nor is an amendment proposing an appropriation in order during the consideration of any bill reported by any other committee.[24] The Appropriations Committee is the largest standing committee in the House consisting this session of forty-five members, more than one tenth of the House.[25] It is an "exclusive" committee, i.e., its members may not serve on any other committee.[26] Most important of all, it enjoys the privilege of being able to get a House vote on any general appropriation bill reported by it, without the intervention of the Rules Committee, and the bill remains privileged until disposed of.[27] To prevent the Appropriations Committee from usurping the functions of other committees, however, the Appropriations Committee is deemed a non-legislative committee and may not report any "legislation" in any general appropriation bill.[28] The rule also provides that no appropriation shall be reported in any such bill "or be in order as an amendment thereto,

[22] In both Houses and under customary parliamentary procedure, a motion for reconsideration can only be made by a voter who voted originally for the prevailing side, Senate Rule XIII, § 1; House Rule XVIII.

[23] Independent Offices Appropriation Act of 1945, § 213 (Pub. L. No. 358, June 27, 1944).

[24] H.R. 4879, H.R. Rep. 1511, 78th Cong. 2d Sess. (1944). For a brief nontechnical description of Congressional appropriation procedure, see Young, This Is Congress c. 7 (1943).

[24] House Rule XXI, § 4. Private claims bills are not within the rule, Deschler, op. cit. supra, note 2, at § 348.

[25] H.R. 537, 79th Cong. 1st Sess., approved February 28, 1946. The permanent size of the committee is thirty-five members, Rule X.

[26] This is an unwritten, but well-established, rule, Cannon, op. cit. supra, note 2, at 83.

[27] Deschler, op. cit. supra, note 2, at § 732.

[28] House Rules, XXI, § 2.

for any expenditure not previously authorized by law."[29] The question, therefore, upon which the FEPC appropriation hinged, was whether an executive order was a previous authorization of law within the meaning of the rule.[30] But the rules of the House, particularly those declaring certain matters out of order, are not self-executing. A point of order must be invoked and the presiding officer must sustain it. A custom has also developed whereby points of order are either ignored or "waived" by unanimous consent. Furthermore, the House Rules Committee has the power to propose to the House that it shall adopt a special order of business barring points of order on a particular bill or portion thereof. This recommendation or "rule" of the Rules Committee becomes binding when adopted by a majority of a quorum of the House.

As we have noted, on Thursday, May 25, 1944, the Appropriations Committee had reported out an appropriation bill carrying an item for the FEPC. But late in the afternoon of May 23, Clarence Cannon (Dem.-Mo.), chairman of the Appropriations Committee, in an unusual move requested unanimous consent that all points of order be waived on the appropriation bill, which, he announced, would be reported out the next day. After some questions by John Taber (Rep.-N.Y.), the ranking minority member of the Appropriations Committee, the unanimous consent was granted.[31] On May 25, when the appropriations bill came up for consideration, Malcolm C. Tarver (Dem.-Ga.) objected that the unanimous consent had been granted before the bill had been reported and before the Appropriations Committee as a whole had even considered it.[32] Speaker Rayburn, citing precedents, overruled the point of order, whereupon Clifford P. Case (Rep.-S.D.) took an appeal to the entire House.[33] John W. McCormack, (Dem.-Mass.), the majority leader of the House, moved that the appeal be tabled. This motion was carried by a voice vote and the Speaker thereby sustained.[34] Rep. Cannon, smarting under the charge

[29] The Senate rules contain somewhat similar provisions, see p. 424, infra.

[30] This point is discussed at p. 425, infra.

[31] 90 Cong. Rec. 4917 (1944). The members of each party look to the ranking members of their party on any committee to safeguard the party's political interests.

[32] The Appropriations Committee is divided into numerous subcommittees, each of which deals with a particular appropriation bill. The full committee meets one or two days before the bill is scheduled to be reported to consider the recommendations of the particular subcommittee involved.

[33] Such appeals are rare and are rarely successful. The tradition of the House is that the presiding officer shall be advised by the official parliamentarian, a paid employee, on parliamentary questions and that the precedents of the House shall be rigorously followed.

[34] Under the House rules, a motion to table is tantamount to a motion to defeat since there is no way of taking a matter from the table except by unanimous consent or a suspension of the rules, Cannon, op. cit. supra, note 2, at 408.

that he had tricked the House, took the floor in his defense. Mr. Cannon is recognized as the greatest authority in the House on its procedure, being a former Parliamentarian of the House and author of its authoritative collection of House precedents. He argued that the FEPC item would not in any event have been subject to the point of order, "for the reason that the item [the FEPC] is submitted by the Bureau of the Budget as being authorized under the war powers of the President." He then asked unanimous consent that the special rule waiving points of order, previously agreed to by the House, be modified so as not to apply to the FEPC item. Rep. Marcantonio, the most resourceful and alert parliamentarian on the FEPC side, objected, however, and the unanimous consent was denied. Rep. Cannon thereupon asked that he be recognized for the purpose of moving a suspension of the Rules. Speaker Rayburn replied properly that the motion to suspend the rules could only be made on two specified days in the month and was not then in order.[35] The House then resolved itself into the Committee of the Whole House on the State of the Union and proceeded to debate the appropriations bill.[36] The debate continued for two days, in the course of which Rep. Cannon argued at great length that the FEPC item was "authorized by law."[37] Finally a vote was had on the Tarver motion to strike from the appropriation bill the entire amount set aside for the FEPC. The motion was carried in the Committee of the Whole, first by a division vote of 139 to 95, and then by a teller vote of

[35] Rule XXVII, § 1, provides that the Speaker shall not entertain a motion to suspend the rules except on the first and third Monday of the month. Such a motion requires a favorable vote of two-thirds of those voting.

[36] Under the rules, all appropriation bills are debated in the Committee of the Whole, which consists of all the members of the House (Rule XXIII, § 3). This committee serves two useful functions. Article 1, section 5, of the Constitution of the United States provides that ". . . . a majority of each [House] shall constitute a quorum to do business." A quorum of the Committee of the Whole, however, is 100 instead of the 218 which is a majority of the House (Rule XXIII, § 2). Thus the debate (but not the final vote) on an appropriation bill proceeds before a smaller body, more easily held together. Secondly, the House rules forbid a roll-call vote in the Committee of the Whole (Cannon, op. cit. supra, note 2, at 104), a device sometimes used for purposes of delay. Thus the constitutional requirement of a roll-call "on any question" on the request of one-fifth of the members present is circumvented. The presiding officer of the Committee of the Whole is not the Speaker but is a member designated by the Speaker.

[37] 90 Cong. Rec. 5016–5020 (1944). He cited Hirabayashi v. United States, 320 U.S. 81 (1943); an article by former Chief Justice Hughes, 42 A.B.A. Rep. 232, 238 (1917); Ken-Rad Tube and Lamp Corp. v. Badeau, 55 F. Supp. 193 (Ky., 1944); an opinion of an Attorney General, 39 Op. Att'y Gen. 347 (1939); the autobiography of Theodore Roosevelt; the wartime powers of Presidents Lincoln, Adams, Jefferson, Polk, McKinley, Buchanan, and Wilson; the seizure by President Franklin D. Roosevelt of the North American Aviation Company plant before we entered the war; the proclamation of the Monroe Doctrine; and other executive orders issued by President Roosevelt during World War II.

141 to 103.[38] Shortly thereafter, the Committee of the Whole "rose" and its presiding officer reported to the Speaker the committee's recommendation that the FEPC item be stricken. Rep. Marcantonio, still fighting, moved for a roll-call vote, which was denied because not seconded by the requisite one-fifth of those present. In a last desperate effort, he demanded a vote by tellers, which was ordered. The vote this time was 123 in favor of the FEPC item and 119 against. The majority of 38 had shrunk to a deficit of 3 votes in the hour that had elapsed between both votes, although the size of the total vote remained substantially the same, 244 in the Committee of the Whole and 242 in the House. There is no way of determining, in the absence of a record vote, whether the result was due to a change of heart on the part of certain Congressmen or a difference in the composition of the total vote. The FEPC appropriation had passed the House,[39] but it faced unknown dangers in the Senate.

On June 15, 1944, the Senate began the consideration of the House-approved bill containing the FEPC item. The jockeying began at once. That same day, John A. Danaher (Rep.-Conn.) filed a notice of his intention to move to add to the bill by way of a rider the full text of a bill to create a statutory fair employment practice commission.[40] Friends of the FEPC were wary of this maneuver, fearful that it would jeopardize the passage of the vital appropriation measure, since some Senators who might approve a wartime agency without sanctions would reject a statutory agency whose orders were enforceable. The next day Sen. Danaher announced that he had discussed the matter with Malcolm Ross, chairman of the FEPC, and upon Ross's request would not press the amendment.[41] Sen. Russell began a frontal attack on the FEPC item with a motion to strike it out. On June 20, by roll-call vote, his motion was defeated, 38 to 21. His forays were more successful. Three riders were added to the FEPC item designed to limit its powers. These riders in effect forbade Presidential seizure of any plant for noncompliance with any order of the

[38] The House has four methods of voting: (1) a viva voce vote; (2) a division vote, in which hands are raised and counted; (3) a teller vote, in which first the members for and then those against pass between two members (tellers) who count them; (4) a roll-call vote. A division is available on request, except when the voice vote is so clear that the request is dilatory; a teller vote, like a roll-call, requires a request from one-fifth of those present, Cannon, op. cit. supra, note 2, at 418.

[39] The final vote was 247 to 58. 90 Cong. Rec. 5153 (1944).

[40] An amendment or rider to an appropriation bill but not to any other type of bill must be "germane" under the Senate rules (Rule XVI, § 4). Sen. Danaher's move was therefore a gesture.

[41] 90 Cong. Rec. 6014 (1944).

FEPC, forbade the committee to issue any regulation or order modifying any act of Congress, and gave respondents in FEPC proceedings the right to appeal to the President.[42] Sen. Russell's fourth rider, to prevent the FEPC from spending more than 25 per cent of its appropriations in salaries for Negro employees, was rejected, however, by a 31 to 22 vote.[43] The bill passed the Senate and on June 22, the conference committee report was adopted by both Houses. The bill subsequently became law.[44] FEPC was assured of at least another year's existence.

PERMANENT FEPC

In the meantime, A. Philip Randolph and others associated with him had come to the conclusion that legislation was needed to furnish FEPC with the powers it lacked. A National Council for a Permanent FEPC was created under the honorary chairmanship of Senators Robert F. Wagner (Dem.-N.Y.) and Arthur Capper (Rep.-Kans.) to push such legislation. More than a hundred national organizations joined in the effort. On January 17 and 18, 1944, three identical bills[45] were introduced in the House, proposing the establishment of a statutory Fair Employment Practice Commission, patterned after the National Labor Relations Board, with power to issue judicially enforceable orders against discriminatory employers and trade unions. The bills were referred to the House Committee on Labor, of which Mrs. Mary T. Norton (Dem.-N.J.) was chairman. On June 21, 1944, the day after FEPC's appropriation victory in the Senate, Dennis Chavez (Dem.-N.M.) introduced a bill on behalf of himself and five other Senators to create a statutory FEPC.[46] Congress recessed shortly thereafter for the political conventions.[47] Sen. Chavez's

[42] None of these riders proved to be of great consequence.

[43] 90 Cong. Rec. 6350 (1944). The basis for the proposed amendment was the charge that too many of the employees of the FEPC were Negroes.

[44] National War Agency Appropriation Act, 1945 (Pub. L. No. 372, June 28, 1944).

[45] H.R. 3986 by Thomas E. Scanlon (Dem.-Pa.), H.R. 4004 by William L. Dawson (Dem.-Ill.), and H.R. 4005 by Charles M. LaFollette (Rep.-Ind.); all 78th Cong. 2d Sess. (1944). Under the House Rules, unlike those of the Senate, two or more members may not introduce a single bill. To establish joint sponsorship, therefore, identical bills must be introduced. The minute variations among the three bills are due to typographical errors.

[46] S. 2048, 78th Cong. 2d Sess. (1944). This bill was identical with the Scanlon bill in the House, note 45, supra.

[47] The Republican National Convention adopted the following plank for its 1944 presidential campaign: "We pledge the establishment by Federal legislation of a permanent Fair Employment Practices Commission." The Democratic plank was a masterpiece of evasion: "We believe that racial and religious minorities have the right to live, develop and vote equally with all citizens and share the rights guaranteed by our Constitution. Congress should exert its full constitutional powers to protect those rights."

bill was reported favorably by the Committee on Education and Labor on September 20, 1944, but was not brought out on the floor during the remaining months of the 78th Congress.[48] In the House, following public hearings, the Scanlon bill was reported favorably on December 4, 1944, by the House Committee on Labor.[49] Mrs. Norton immediately filed a discharge petition,[50] but the session of Congress expired before the petition received sufficient signatures. The bill therefore did not come before the House.

The 79th Congress began its first session on January 3, 1945, and within a month thirteen separate bills were introduced in the House by as many Congressmen, proposing the creation of a permanent FEPC.[51] The House Labor Committee, to which the bills were referred, acted with dispatch. Because of the prior session's public hearings, no further hearings were held, and on February 20 the Labor Committee reported a committee bill, H.R. 2232, introduced, at its request, by its chairman, Mrs. Norton.[52] Three days later, Mrs. Norton introduced a resolution,[53] which was referred to the Rules Committee, asking for a House vote on H.R. 2232. Mrs. Norton required this help from the Rules Committee, because without it there was no practical method of bringing her bill on the House floor for a vote. The House Rules are devised to prevent such consideration against the wishes of the Rules Committee. Only revenue and appropriation bills (and the bills of a few minor committees with extremely limited jurisdiction[54]) can get on the House floor without a special rule from the Rules Committee. In this respect the House procedure differs from the Senate and that of almost every other parliamentary body. If the Rules Committee refuses to grant a rule, the only parliamentary alternatives are

[48] Cal. No. 1126, Rep. 1109. Allen J. Ellender (Dem.-La.) dissented. Hearings before the Senate committee were conducted from August 30 to September 8, 1944. In reporting his bill, Sen. Chavez announced that the Senate Committee on Education and Labor had agreed not to call it up until after the Presidential elections of November, 1944. Robert A. Taft (Rep.-Ohio) likewise agreed to this delay, 90 Cong. Rec. 7973 (1944).

[49] Union Calendar No. 668, Rep. 2016. The hearings before the House committee were held from June 1 to 16, 1944, and on November 16, 1944.

[50] H. Res. 668, 78 Cong. 2d Sess. (1944).

[51] These bills are identified and distinguished in the report of the House Committee on Labor, Rep. 187, 79th Cong. 1st Sess. (1945). Although the Senate is a continuous body, a bill must be reintroduced and referred to committee in one Congress, although reported out of committee in a prior Congress, see note 13, supra.

[52] Individual minority reports were made by O. C. Fisher (Dem.-Tex.) and Clare E. Hoffman (Rep.-Mich.).

[53] H. Res. 146, 79th Cong. 1st Sess. (1945).

[54] The list is given in Cannon, op. cit. supra, note 2, at 90.

a discharge petition or the use of Calendar Wednesday.[55] The Rules Committee is therefore a powerful weapon in the hands of the majority leadership. To insure that party's control over the Rules Committee, eight out of its twelve members are Democratic, although in every other committee the percentage of Republican membership is roughly equal to the percentage of Republicans in the entire House.[56] Of the eight Democrats on the Committee, four are Southern Democrats and two are from border states.[57] The Rules Committee, however, does not have the power to decide questions of procedure. It may merely *recommend* a special rule or order of business to the House, which the latter must agree to by a majority vote.[58] In practice, however, its recommendations are seldom rejected.

Mrs. Norton appeared before the Rules Committee on March 8, 1945,[59] and requested it to report out a special rule. The most amazing parliamentary gyrations then took place. The Republican members were more or less committed to the establishment of a permanent fair employment practice commission because of the Republican party platform of 1944. The expected division, therefore, on Mrs. Norton's request, was six Southern and border-state Democrats against four Republican and two Northern Democrats. The Republicans, however, refrained from attending the scheduled meetings of the committee. Since every Republican vote was necessary, any absence jeopardized the chances of obtaining a majority. The Southern Democrats in turn often absented themselves to prevent a committee quorum.[60] On more than one occasion when a Southern Democrat was absent the Republicans engaged in dilatory tactics to delay the vote. Since only two members of the committee of twelve, Adolph J. Sabath (Dem.-Ill.), its chairman, and John J. Delaney (Dem.-N.Y.), sincerely favored the granting of a rule, it was impossible to compel action. The Rules Committee usually acts with dispatch merely upon the application of the committee chairman requesting a rule, and rarely discusses the

[55] This rule is discussed at p. 421, infra.

[56] By unwritten rule, Cannon, op. cit. supra, note 2, at 83.

[57] E. E. Cox, Ga., Howard W. Smith, Va., William M. Colmer, Miss., J. Bayard Clark, N.C., Joe B. Bates, Ky., and Roger C. Slaughter, Mo.

[58] Cannon, op. cit. supra, note 2, at 368.

[59] See 91, Cong. Rec. 2741 (1945).

[60] These maneuvers are not a matter of formal record, but the writer attended the public meetings of the Rules Committee and observed Republican members walk out of the committee room just before the vote on the FEPC rule was scheduled to take place. Albert Gore (Dem.-Tex.) charged that the Republican members of the committee "procrastinated" to avoid a vote in the absence of a Democratic committee member, 91 Cong. Rec. 11962 (Dec. 10, 1945).

merits of the legislation involved. This time the Rules Committee met six times over a three-month period to hear Congressional opponents of the legislation.[61] Finally on June 12, 1945, a vote was taken and the committee split 6 to 6, thus denying the request for a rule.

Despairing of any help from the Rules Committee, Mrs. Norton, on April 27, 1945, had filed a discharge petition to by-pass it.[62] Rule XXVII, section 4, of the House Rules provides that whenever 218 members (an absolute majority of the House) have signed a petition to discharge the Rules Committee from further consideration of any special rule or order of business referred to it, the entire House must then vote whether such rule shall be adopted.[63] In effect, therefore, the signing of Mrs. Norton's discharge petition by the requisite number would have been tantamount to a special rule reported by the Rules Committee.[64] To make revolt by the House membership difficult, Rule XXVII is laden with restrictions. Thus, the petition must be kept in the custody of the Clerk of the House, must be signed at his desk only during the sessions of the House,[65] and the names of the signers must be kept secret until 218 have signed.[66] In fact a premature disclosure of the signers gives rise to a question of the privilege of the House,[67] i.e., any member may object to this breach of the rules. The greatest difficulty, of course, is the tremendous number of signatures required, 218, merely for the purpose of obtaining an opportunity for a House vote on the rule. After a period of intensive solicitation by Congressional friends of the FEPC legislation, almost all the non-Southern Democrats had signed the petition. Most of the Republican and *all* the Southern Democrats abstained.[68] On December 10, 1945, Albert Gore

[61] By tradition, only members of Congress may appear before the Rules Committee, although its sessions are public. The committee met on March 8, April 19, April 20, April 25, April 28, 1945, and June 12, 1945; see statement of Chairman Sabath, 91 Cong. Rec. 5796 (1945).

[62] Known as Discharge Petition No. 4. 91 Cong. Rec. 1966, Appendix (1945).

[63] Rule XXVII also contains appropriate safeguards against dilatory or filibustering tactics.

[64] On June 11, 1945, the anti-poll tax bill was brought out on the House floor by means of a discharge petition.

[65] Cannon, op. cit. supra, note 2, at 160.

[66] It is difficult for lobbying groups to solicit signatures or to mobilize public opinion against those who have not signed, since no one can state authoritatively who has or has not signed.

[67] Cannon, op. cit. supra, note 2, at 161.

[68] Minority Leader Joseph W. Martin, Jr., (Rep.-Mass.) announced on December 11, 1945, that as soon as possible after the holiday recess enough Republicans would sign the discharge petition to bring the bill to the floor of the House, "The Washington Post" (Dec. 12, 1945); see also "The Republican News," p. 2, col. 4 (Jan., 1946), the official organ of the Republican National Committee. As of May 1, 1946, four months after the House reconvened, the promise has not yet been fulfilled. There are 190 Republicans in the House.

(Dem.-Tenn.) told the House that 157 members, of whom only 50 were Republicans,[69] had signed the petition. The failure to sign the petition kept the bill off the House floor.

In the meantime, because of the lack of success with the discharge petition, Rep. Norton had fallen back on the last parliamentary device available for getting a vote on the FEPC bill reported out by the House Labor Committee: the Calendar Wednesday rule.[70] According to the House Rules, Wednesday of each week is set aside for the consideration of the reports of committees which otherwise would need a rule from the Rules Committee. The committees are called in a specified order and each committee may theoretically use one Wednesday to call up one of its reports. Calendar Wednesday may not be suspended or skipped except by unanimous consent or upon motion requiring approval of two-thirds of those present. The rule, however, has atrophied. During both sessions of the 78th Congress not a single Calendar Wednesday was invoked and during the first session of the 79th Congress it was used only once.[71] There are two reasons for the failure to take advantage of the rule[72]: first, the House leadership almost always wishes to utilize the Wednesday sessions for what it considers more pressing legislation, and a refusal to suspend means a revolt against that leadership; second, Calendar Wednesday is cumbersome in its application, since the debate on a bill considered under the rule is for practical purposes limited to one Wednesday. But Mrs. Norton, having no alternative, announced that she intended to utilize the rule. On Tuesday, September 25, when the customary request was made for unanimous consent to suspend next day's Calendar Wednesday, she objected.[73] The House normally meets at 12 noon with but a few members present. By the time the Chaplain's prayer is read, the Journal read and approved, and the routine morning business transacted, the other members trickle in. On Wednesday, September 26, however, within fifteen minutes after the session began, William M. Whittington (Dem.-Miss.) moved the adjournment of the House, which was carried by a vote of 74

[69] 91 Cong. Rec. 11962 (Dec. 10, 1945).

[70] Rule XXIV, § 7. This rule was first adopted in 1909.

[71] Riddick, The First Session of the Seventy-Eighth Congress, 38 Am. Pol. Sci. Rev. 301 (April, 1944); The Second Session of the Seventy-Eighth Congress, 39 Am. Pol. Sci. Rev. 317 (April, 1945); see also any issue of the House Calendar, 79th Cong., published weekly.

[72] During the first session of the 76th, 77th, and 78th Congresses 2,005 public bills were reported out of committee, but only 1,746 were acted upon by the House, according to the final House Calendar of Dec. 21, 1943.

[73] 91 Cong. Rec. 9135 (Sept. 25, 1945).

to 31,[74] thus ending the calendar and legislative day.[75] The friends of FEPC thus learned a lesson: Calendar Wednesday could not be utilized unless a firm, stable, and continuous majority was at hand to defeat all dilatory motions. Three unsuccessful efforts were later made to take advantage of Calendar Wednesday.[75a]

THE 1945 APPROPRIATION

While these events were taking place, the FEPC began its uphill fight for a Congressional appropriation for the next fiscal year, beginning July 1, 1945. On March 21, 1945, President Roosevelt submitted a budget request for the agency in the sum of $599,000—a slight increase over its last appropriation.[76] The FEPC estimate was one item in a request of $1,120,453,330 for a group of nineteen war agencies. The FEPC item was referred to a subcommittee of the House Appropriations Committee, which on May 22, 1945, voted to cut the FEPC budget to $250,000.[77] On June 1, 1945, the full Appropriations Committee, however, reported out the war agencies appropriations bill, omitting entirely any request for the FEPC.[78] The Appropriations Committee reported that it had omitted any recommendations for the Office of Price Administration and the FEPC, because legislation on these two subjects was currently pending in the House, and "the only logical course is to await legislation developments." The report of the committee was far from candid. The committee refused a recommendation for FEPC, not because it expected that the agency would soon receive statutory authority, but because it feared that to include FEPC in

[74] 91 Cong. Rec. 9188 (1945). A motion to adjourn does not require a quorum, U.S. Const. art. 1, § 5.

[75] See p. 435, infra.

[75a] On Wednesday, May 15, 1946, a motion to adjourn was adopted by a vote of 99 to 81 shortly after the House convened, thus preventing the call of committees under the rule. On Wednesday, May 26, 1946, the same tactic was repeated, the House adjourning at 3:10 P.M. by a vote of 83 to 81, following six dilatory roll calls. On Wednesday, June 5, 1946, the motion to adjourn was defeated three times by roll call votes of 199 to 103, 188 to 102, and 182 to 107, but finally was adopted at 4:41 P.M. by a vote of 145 to 43. These are the first record votes in the House on the FEPC issue. The Southern Democrats voted in a bloc for adjournment, joined only by a scattering of Republicans. During this session, five dilatory roll calls were ordered, over the objection of FEPC supporters. Two committees were called, however, during the session, and passed over, leaving 15 committees still to be called before the House Committee on Labor may call up the FEPC bill.

[76] H.R. Doc. 120, 79th Cong. 1st Sess. (1945).

[77] This action is not a matter of public record.

[78] H.R. 3368, Rep. 653, 79th Cong. 1st Sess. (1945). The vote in committee was 22 to 11, see 91 Cong. Rec. 6770 (1945).

the appropriations bill would jeopardize the appropriations for the other war agencies.

As we have seen, FEPC had narrowly avoided collision with the rule forbidding appropriations for "any expenditure not previously authorized by law." The device of waiving points of order by unanimous consent, which had been utilized in 1944, could not be tried again because of Southern opposition. John E. Rankin (Dem.-Miss.) had as early as March 13, 1945, warned the House that the FEPC appropriation was subject to a point of order.[79] In fact the point of order had already been successfully invoked on March 2, 1945, to strike a proposed appropriation for a refugee shelter operated by the War Relocation Authority, the presiding officer ruling that "an Executive Order does not meet the requirement" of an authorization of law within the meaning of the House rule.[80] If, however, the FEPC was not authorized by law, neither was the Petroleum Administration for War, the Office of Inter-American Affairs, the Office of Defense Transportation, the Office of Scientific Research and Development, the War Relocation Authority, and the Office of War Information, each of which was created by executive order without any specific statutory authorization.[81] The Appropriations Committee had the choice of sacrificing the FEPC and then obtaining a rule from the Rules Committee barring points of orders against the other executive order agencies, or of insisting that all of such agencies including the FEPC be treated alike on this parliamentary question. Although the latter choice would certainly have snarled up necessary appropriations, it would have been a consistent and honest position and would have safeguarded the FEPC. The committee chose the easier course and struck out the FEPC item.[82] Mrs. Norton later charged that there was "an unholy alliance between the Appropriations

[79] 91 Cong. Rec. 1252, appendix (temporary edition).

[80] This is apparently the first time the rule was employed to defeat an appropriation for a war agency. Although the issue is academic now, a strong case based on House precedents can be made out to show that an executive order is an authorization of law. Previous rulings on this point do not limit the term "law" in the rule to statute. Thus, it has been held that a constitutional provision (7 Cannon's Precedents, op. cit. supra, note 2, at § 1248), a ratified treaty (Ibid., at § 1352), a judgment of the Court of Claims (Ibid., at § 1291), an obligation under an executed contract (Ibid., vol. 4, at § 3645), and even the resolution of a prior House, which is not binding in any way upon a later House (Ibid., vol. 4, at § 3660) are deemed "law." An executive order properly issued by the President pursuant to his constitutional powers should likewise be regarded as "law." Rep. Sparkman cited no precedents to support his ruling.

[81] Some of the other executive order agencies in the bill could trace their authority to an authorization in a war powers statute.

[82] On June 26, 1945, Frank B. Keefe (Rep.-Wis.), a member of the Appropriations Committee, stated on the floor of the House that the committee had decided to cut out the FEPC item to ensure a protective rule from the Rules Committee, 91 Cong. Rec. 6770 (1945).

Committee and the Rules Committee."[83] Perhaps it is more accurate to state that the friends of FEPC on both committees were an exceedingly timid lot.

On June 7, 1945, the House began to consider the war agencies appropriation bill without any protective rule. Rep. Marcantonio threatened to raise a point of order against the other war agencies in the bill, unless funds were provided for the FEPC. Rep. Cannon hurriedly appeared before the Rules Committee that same day and urged a rule barring points of order, but only "against the bill or any provision contained therein." Rep. Marcantonio likewise appeared, but urged a rule which would protect amendments as well, and thus would have permitted the addition of an FEPC item. The committee granted the narrower rule requested by Rep. Cannon,[84] thus demonstrating its hostility to the FEPC.[85] On June 8, 1945, after the rule of the Rules Committee was approved, the House began to debate the war agencies appropriations bill. Rep. Marcantonio made a futile attempt to amend the bill by adding an item for FEPC, but Rep. Rankin's point of order was sustained.[86] The bill passed the House, was sent to the Senate, and was then referred to the Senate Appropriations Committee.

The FEPC faced further parliamentary difficulties in the Senate. Although, as will be pointed out later, the Senate rules are relatively liberal and simple, Rule XVI, relating to amendments to appropriation bills, is as restrictive as any House regulation. Section 2 of this rule forbids the Senate Committee on Appropriations from reporting an appropriation bill "containing amendments proposing new or general legislation."[87] A severe sanction is imposed for a violation of this rule: not merely the elimination of the offensive language but the recommitting of the *entire* bill. Similarly, Section 4 of the rule provides that an amendment "which proposes general

[83] Ibid., at 6771.

[84] H. Res. 289, 79th Cong. 1st Sess. (1945). The rule was designed to allow points of order against any effort by amendment to include the FEPC item. It seems clear that the Rules Committee would not have granted a rule barring points of order, had the bill contained the FEPC item; see speech of Rep. Cannon on June 7, 1945, 91 Cong. Rec. 5733–35 (1945). The Rules Committee here acted in behalf of a committee privileged to report without its intervention. Without such help, the Appropriations Committee would have required a suspension of the point of order rule by a two-thirds vote. The Rules Committee required only a majority vote for its recommendations.

[85] The Rules Committee also rejected a last-moment request of Pres. Truman made on June 5, 1945, (after the House Appropriations Committee had refused to recommend funds for FEPC), urging a special rule for FEPC and pointing out that its appropriation was endangered. The text of the President's letter appears in 91 Cong. Rec. 5796 (1945).

[86] Ibid., at 5831.

[87] The Senate is not bound by this rule, however, if the House passes an appropriation containing "legislation," S. Jour. 502 (1916).

legislation" may not be offered from the Senate floor.[88] The Senate Appropriations Committee was consequently called upon to decide whether an appropriation for an agency created by executive order was "new or general legislation." By "legislation" is meant, of course, a command of the state forbidding the commission of certain acts or directing the performance of others. The appropriation which the President had requested for FEPC did not in itself forbid discrimination or any other act; its aim was merely to provide funds by which the FEPC could carry out the functions vested in it. The "legislation" is contained in the executive order. That order would not have been repealed by the failure to appropriate funds for the FEPC, nor would it have been given statutory authority by such fiscal grant. Theoretically, the FEPC could function without any funds, using volunteer help exclusively. Indeed, one provision of the executive order, directing the federal procurement agencies to include nondiscrimination clauses in all federal contracts, imposed an obligation whether or not there was an FEPC and whether or not funds were provided for it.

The Senate precedents cited in Gilfry are contradictory. In 1909, one presiding officer, after observing that there "was no well defined line of decision" on the point, stated:

> The impression created upon the mind of the present occupant of the chair, after a somewhat careful and thorough examination of the subject, is that the Senate has been largely controlled in its interpretation of the rule for more than a third of a century by a consideration of the public interest involved at the time being, rather than by any regard for its technical meaning or strict application.[89]

The Senate Appropriations Committee was not even willing to include the FEPC item and wait for a ruling from the presiding officer. (If the entire bill had been recommitted, it would have been a simple matter to report out a new bill the next day which omitted the FEPC item.) It adopted a face-saving compromise. By a vote of 14 to 4, it reported out the appropriation bill on June 20, 1945, without the FEPC item, but authorized Sen. Chavez on its behalf to move to suspend the rules to allow an amendment appropriating $446,200 for the FEPC.[90] The FEPC was flung from the frying pan into the fire, for a suspension of the rules requires a two-thirds vote.[91] Since 20 of the 22 Southern senators[92] were implacable

[88] Section 4 refers to amendments offered by individual senators.

[89] Gilfry, op. cit. supra, note 2, at 120.

[90] Calendar No. 373, Rep. 380 (on H.R. 3368), 79th Cong. 1st Sess. (1945). Sen. Chavez filed the required notice of motion the same day, 91 Cong. Rec. 6322–23 (1945).

[91] Rule XL. It is characteristic of the Senate rules that Rule XL does not even state the size of the majority required. The two-thirds concurrence is a matter of unwritten law based on Senate precedents.

[92] Sen. Pepper of Florida voted for the agency; the late Carter Glass (Dem.-Va.) had been absent from the Senate for several years because of illness.

foes of the FEPC and at least half a dozen Republicans were likewise opposed to further continuance of the agency, the affirmative support of at least twice as many supporters (52 senators) was required to approve the suspension motion.

The Senate began its consideration of the appropriation bill on June 26, 1945, five days before the beginning of the new fiscal year. But Theodore G. Bilbo (Dem.-Miss.) was unwilling to hazard the suspension motion. On June 27, he obtained possession of the floor with the announced intention of occupying it indefinitely, in order to prevent Sen. Chavez from moving to suspend the rules. During the course of his remarks, Sen. Bilbo yielded the floor temporarily to Kenneth McKellar (Dem.-Tenn.), who proposed a compromise. Sen. McKellar suggested that in lieu of the $446,200 for one year which Sen. Chavez had proposed in his notice of motion, the sum of $250,000 be provided for the FEPC, but only for six months of operation.[93] Sen. McKellar appealed to Senators Chavez and Bilbo to accept the compromise and so make possible the passage of the appropriations bill carrying one billion dollars for sixteen different war agencies. Both refused, Chavez because the McKellar amendment would not allow the FEPC any funds after December 31, 1945; Bilbo, because the proviso did not specifically state that the FEPC would be terminated at the end of the six-months period.[94] The day ended with Bilbo in firm possession of the floor.

The next day, Thursday, June 28, Sen. Bilbo resumed where he had left off and then yielded the floor. Alben W. Barkley (Dem.-Ky.), the majority leader, subsequently was recognized and suggested a different form of compromise: an appropriation of $250,000 for a twelve-month period.[95] Sen. Chavez announced his acceptance, but Sen. Bilbo stated that he could not do so without conferring with his associates. Sen. Taft, in the interim, had been collecting signatures on a petition for cloture (Rule XXII), which, if approved, would have shut off all debate on the appropriations measure.[96] Under Rule XXII the "debate upon any pending measure" may be limited in the following manner:

[93] 91 Cong. Rec. 6820–21 (1945).

[94] Ibid., at 6822–23.

[95] Ibid., at 6922.

[96] In the House of Commons, closure may be invoked at any time and without notice or other formalities, but the speaker (who renounces political affiliations upon his election) may in his discretion "refuse the closure if in his opinion the motion is an abuse of the rules of the House or an infringement of the rights of the minority." Campion, Introduction to the Procedure of the House of Commons 159 (1929).

1. A petition to that effect must be signed by sixteen senators.
2. The petition must be "presented to the Senate."
3. The petition is voted on *two days* later at 1:00 P.M.
4. Two-thirds of the senators present must vote for cloture.
5. Thereafter each senator is entitled to speak for one hour on the pending measure, all dilatory motions or amendments being out of order and all points or order and appeals therefrom being decided without debate.

Since the fiscal year ended on Saturday, June 30, it was essential for Sen. Taft to present his signed petition that day, June 28. Sen. Barkley, however, refused to yield the floor to Sen. Taft, so that the latter might present his cloture motion. Instead, Sen. Barkley moved for a recess to give Sen. Bilbo and his associates a chance to consider the compromise he had offered. Sen. Taft, opposing the motion to recess, obtained a roll-call vote, which disclosed 28 senators opposed to recess and 19 in favor.[97] This vote was not decisive, since only 47 senators had voted, less than a quorum.[98] The sergeant-at-arms was then directed to request the presence of missing senators.[99] After a slight delay two senators entered the chamber, whereupon Sen. Barkley withdrew his request for a recess and yielded the floor.

It was now late in the evening and Sen. Taft needed to file his cloture petition by twelve o'clock that night in order to obtain a vote on cloture by Saturday. But a quorum call again disclosed the lack of a quorum, only 42 senators answering to their names. Again the sergeant-at-arms was directed to round up missing senators. But an hour and a half elapsed[100] before he could procure the forty-eighth senator,[101] who did not appear until 12:12 A.M. on Friday, June 29. The Democratic leadership had defeated the Republican plan for a cloture vote before the end of the fiscal year.[102] Sen. Taft then filed his petition for a vote on cloture which was signed by 10 Democrats, 21 Republicans, and 1 Progressive,[103] Sen.

[97] 91 Cong. Rec. 6925 (1945).

[98] A quorum is a majority of the Senate. U.S. Const. art. 1, § 5.

[99] A power specifically authorized by the Constitution, art. 1, § 5.

[100] See the charge of Wayne Morse (Rep.-Ore.) on July 12, 1945, 91 Cong. Rec. 7581.

[101] At that time, because of a vacancy, the Senate consisted of only 95 senators.

[102] It was charged on the floor of the Senate that the Sergeant-at-arms, an elected officer of the Senate (and therefore chosen by the Democratic majority) had deliberately "stalled" in his corralling activities, 91 Cong. Rec., 6927 (1945).

[103] 91 Cong. Rec. 6927 (1945).

Chavez filed his FEPC amendment to the appropriation bill,[104] and at 12:33 A.M. the weary Senate recessed.

Friday, June 29, was a short session, devoted almost entirely to an intemperate address by James O. Eastland (Dem.-Miss.). On Saturday, June 30, Sen. Chavez formally offered his amendment to the appropriation bill to provide $446,200 for the FEPC. The presiding officer Clyde R. Hoey, (Dem.-N.C.) promptly ruled it out of order and Sen. Chavez took an appeal from his ruling to the Senate. Sen. Barkley argued that the ruling of the presiding officer should be sustained. He conceded that the FEPC amendment was not "new or general legislation"[105] within the meaning of Rule XVI, section 2, but insisted that it was nevertheless barred by the italicized clause of the following rule:

> 1. All general appropriation bills shall be referred to the Committee on Appropriations, and no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, *unless it be made to carry out the provisions of some existing law*, or treaty stipulation, or act, or resolution previously passed by the Senate during that session; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with law.

Sen. Barkley contended that the proviso "unless it be made to carry out the provisions of some existing law" excluded the FEPC item. His view was challenged by Joseph C. O'Mahoney (Dem.-Wyo.), who argued that since the President admittedly had the power to issue an executive order, his act was in accordance with "law." Any other interpretation, the senator from Wyoming pointed out, "constituted a threat to every single executive order which has been issued by the President in this emergency."[106]

Both sides, however, appear to have overlooked the last proviso in section 1, reading:

> ; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with the law.

[104] Difficult parliamentary questions about the Chavez amendment were raised during the debate. Under the rule, once cloture was adopted, no amendment would thereafter be in order In addition, as we have seen, before Sen. Chavez could get a vote on his amendment, he still needed a two-thirds majority on his motion to suspend the rules. Hence, a two-thirds concurrence was needed twice, once on the motion to limit debate and again on the motion to suspend Rule XVI.

[105] 91 Cong. Rec. 7054 (1945).

[106] No precedent was cited by those who argued against Sen. Chavez's amendment, but such precedents rarely are cited in Senate debate. After James Mead (Dem.-N.Y.), who was well briefed, cited Gilfry in support of the FEPC amendment, Sen. Russell intimated that he had never heard of Gilfry.

This proviso, it must be emphasized, is preceded by a semi-colon and modifies all the other restrictive conditions. In other words, the rule forbids amendment to appropriation bills which increase items or add new items unless (1) the amendments carry out some provision of existing law; or (2) the amendments are moved by direction of a standing committee; or (3) the amendments are "proposed in pursuance of an estimate submitted in accordance with law." If any and all amendments are barred which do not carry out the provisions of existing law, then what is the purpose of the clause allowing amendments to be moved by direction of a committee? That clause must have been intended as an *alternative* to the requirement that the amendment carry out the provisions of existing law. The FEPC amendment was protected by the third alternative, since it was prepared by the Bureau of the Budget and "submitted in accordance with law" by the President.[107]

Sen. Chavez, however, withdrew his appeal and moved to suspend the rules in order to circumvent the point of order.[108] Sen. Barkley, who in all these parliamentary matters strove desperately to hold together the Northern and Southern wings of his party, then proposed a compromise appropriation of $250,000 for FEPC and offered an amendment to that effect.[109] No point of order was made, and on June 30, 1945, Sen. Barkley's compromise was accepted by a vote of 42 to 26.[110] The appropriation bill was then quickly adopted and conferees were appointed to meet with the House to iron out the differences in the Senate and House versions of the war agencies appropriation bill.[111]

While these events were taking place in the Senate, the House Appropriations Committee made an attempt to wind up FEPC's affairs in an orderly manner, for FEPC found itself faced with the prospect not only of having no funds with which to operate during the coming year, but even without funds with which to liquidate.[112] The House Appropriations

[107] H.R. Doc. 120, 79th Cong. 1st Sess. (1945); 42 Stat. 20 (1921), 31 U.S.C.A. § 11 (1927).

[108] Sen. Chavez would not have lost any parliamentary right or advantage by insisting on his appeal, and, that failing, by pressing his motion to suspend. Sen. Chavez, however, in all of these maneuvers, rarely took a position which differed from that of the leader of his party in the Senate.

[109] Sen. Barkley agreed to withdraw his amendment, if a point of order was made against it. As we have seen, almost any Senate rule can be waived by the simple expedient of not raising a point of order.

[110] 91 Cong. Rec. 7065 (1945).

[111] The names of the conferees appears at 91 Cong. Rec. 7068 (1945).

[112] The accumulated annual leave of its employees, i.e., the vacation pay allowed them by law amounted to about $45,000, 91 Cong. Rec. 6777 (1945).

Committee on June 25, 1945, therefore voted out a "joint resolution" appropriating $125,000 to FEPC for purposes of liquidation.[113] Although, as has been noted, the House Appropriations Committee has the privilege of having the general appropriations bills it reports out considered immediately by the House,[114] the liquidation resolution for FEPC was not a general appropriation bill. Thus the Appropriations Committee needed a rule from the Rules Committee to bring the joint resolution on the floor for consideration. On June 28, 1945, the Rules Committee, however, refused to grant the rule requested. Although that committee could have voted out a stringent and restrictive rule allowing a vote only on the joint resolution and forbidding any amendments on the House floor, its rules or special orders or procedure are merely recommendations to the entire House. The House by a majority vote could have amended such a rule by incorporating a full $500,000 appropriation for FEPC without any provision for liquidation.[115] Hence the Rules Committee declined to act, and no simple parliamentary device was available to compel it to act.[116]

The adoption by the Senate of the war agencies appropriation bill did not mean the end of the legislative fight. Ordinarily when the Senate amends a House bill, conferees from both Houses are at once appointed to compose the differences in the two versions.[117] Under the House rules, however, any Senate amendment to a House bill must be referred to the House Committee having jurisdiction.[118] This rule is almost always waived

[113] H.J. Res. 219, Rep. 786, Union Calendar No. 234, 79th Cong. 1st Sess. (1945). The resolution contained a proviso that if the agency "were continued by an act of Congress" the money could be used for operational purposes until additional funds were provided. For references to the debate in the Committee, see 91 Cong. Rec. 6768–69 (1945).

[114] See Deschler, op. cit. supra, note 2, at § 732; Rule XI, Clause 45.

[115] The procedure for amendment of a rule from the Rules Committee is by no means simple. A motion to amend can be offered only if the floor is obtained for that purpose. Since the motion for the previous question is usually adopted quickly, thus cutting off opportunities for amendment, the only practical alternative is to vote down the previous question, Cannon, op. cit. supra, note 2, at 388. Following the defeat of the motion for the previous question, the Speaker will recognize the leader of those opposed to the rule, who can then offer an amendment to the proposed rule. See 92 Cong. Rec. 609 (Jan. 30, 1946).

[116] A discharge petition can discharge a rule from the Rules Committee, but the petition needs 218 signatures and can be called up for vote only on the second or fourth Monday of a month. In addition, the rule for which discharge is sought must have been pending before the Rules Committee for seven days, Rule XXVII, § 4.

[117] Under the House Rules, where one chamber has designated a figure in a bill and the other has not, the conferees are restricted to a point between zero and the designated figure, Cannon, op. cit. supra, note 2, at 128. The conferees could therefore not increase the appropriation above the $250,000 voted by the Senate. The same restriction does not apply to the House itself, 8 Cannon's Precedents, op. cit. supra, note 2, at § 3189; ibid., vol. 5, at § 6187.

[118] Cannon, op. cit. supra, note 2, at 112.

by unanimous consent and the bill sent to the conference. When the war agencies appropriation bill, however, was returned from the Senate to the House on June 30, this unanimous consent was refused.[119] Thus the fiscal year ended and sixteen war agencies, including the FEPC, faced the first payday of the new fiscal year without funds.[120]

The next move was by Chairman Sabath of the Rules Committee. He called a meeting to consider a special rule for the appropriation bill, but was defeated on July 2, by a tie vote of 5 to 5. That same day the Speaker referred the bill to the House Appropriations Committee.[121] The next day the Appropriations Committee by a vote of 21 to 11[122] refused to report out the bill. Had the bill containing the Senate FEPC amendment been reported out by the House Appropriations Committee, the point of order would no longer have been valid, since the House rule forbidding unauthorized expenditures is not applicable to Senate amendments.[123] The House Appropriations Committee, instead, met that same day and voted out an entirely new appropriation bill which still contained no item for the FEPC[124] and in almost all other respects was identical with the appropriation bill it had reported previously on June 1, 1945. The House found itself at the same point from which it had started. The Appropriations Committee again requested a rule from the Rules Committee to protect the executive order agencies in the bill from points of order, but this time the rule was denied.[125]

The new war agencies appropriation bill came before the House on July 5. Rep. Marcantonio, Emanuel Celler (Dem.-N.Y.), and Mrs. Norton immediately made points of order against the appropriations for the National War Labor Board, the Office of Defense Transportation, the Office of Economic Stabilization, the Office of Inter-American Affairs, the Office of War Information, the War Production Board, the War

[119] 91 Cong. Rec. 7101 (1945). Four Southern Democrats objected.

[120] A special provision (Sec. 404) was, however, hurriedly inserted in the proposed Second Deficiency Appropriation Act authorizing obligations in anticipation of the enactment of regular appropriation acts, H.R. 3579, 79th Cong. 1st Sess. (1945).

[121] 91 Cong. Rec. 7249 (July 2, 1945).

[122] See 91 Cong. Rec. 7344–45 (July 5, 1945) as to the vote.

[123] While Rule XX, § 2 prohibits House conferees from agreeing to a Senate amendment authorizing any expenditure not authorized by law, the section expressly allows the House itself to authorize such approval by the conferees. See also 8 Cannon's Precedents, op. cit. supra, note 2, at § 3188.

[124] Union Calendar No. 251, Rep. 851, H.R. 3649, 79th Cong. 1st Sess. (1945).

[125] Presumably because the Rules Committee feared that any rule it proposed might be amended on the House floor. Congressional friends of the FEPC were organizing for that very purpose. See 91 Cong. Rec., appendix, p. 3522, 3523 (July 5, 1945).

Shipping Administration, the Office of Strategic Services, and the Petroleum Administration for War. All of their points were sustained[126] and the items objected to, stricken. The bill was thereupon adopted by the House and sent to the Senate. The Senate, however, was in no mood for further House jockeying. The Senate Appropriations Committee, to whom the new war agencies appropriation bill passed by the House was referred, refused to consider it. The Senate, following its session on Monday, July 9, recessed to July 12 to give the House time in which to work out a solution. On the morning of Wednesday, July 11, the House Appropriations Committee met and voted to report out the first war agencies appropriation bill (H.R. 3368) as amended by the Senate, but, in place of the Senate language for the FEPC item, substituted the following:

> Salaries and expenses: For completely terminating the functions and duties of the Committee on Fair Employment Practices, including such of the objects and limitations specified in the appropriation for such agency for the fiscal year 1945 as may be incidental to its liquidation: $250,000.

When the House met that afternoon, Rep. Marcantonio, who acted as the Congressional watchdog for FEPC, warned that the proposed appropriation could be used only for purposes of liquidation and threatened a floor fight against it.[127] The Appropriations Committee was hurriedly called into session and then added the following proviso to the language above quoted:[128]

> Provided that if and until the Committee on Fair Employment Practice is continued by an Act of Congress the amount named herein may be used for its continued operation until an additional appropriation shall have been provided.

On July 12, the House considered the House Appropriation Committee's substitute for the Senate FEPC item. An amendment by Rep. Colmer (Dem.-Miss.) to strike the words "and until" in the proviso above quoted (which would have robbed it of its purpose) was defeated by a vote of 116 for and 180 against.[129] But a second proviso offered by Rep. Case (Rep.-S.D.) reading: "Provided further that in no case shall the fund be available for expenditure beyond June 30, 1946," was approved by a vote of 142 to 116.[130] The bill was thereupon adopted. Events thereafter were routine. The Senate conferees accepted the House version of the FEPC item, and both Houses accepted the conference report.[131] The bill

[126] Ibid., at 7338.

[127] 91 Cong. Rec. 7525 (July 11, 1945).

[128] 91 Cong. Rec. 7594 (July 12, 1945).

[129] Ibid., at 7607.

[130] Ibid., at 7608.

[131] There was no record vote in the Senate or the House.

was sent to the President for signature on July 14, and became law on July 15, 1945.

Within a month world events completed what Congress had begun. The surrender of Japan and the rapid reconversion of "war industries" to peacetime pursuits put an end to most of the jurisdiction of the FEPC. The halving of the appropriation, far from being a compromise,[132] deprived the agency of the possibility of fulfilling even its circumscribed tasks. In August, 1945, the staff of FEPC was reduced from 117 to 51 and five of its 15 field offices closed. On December 15, 1945, its staff was still further reduced to a corporal's guard and all but three of its field offices closed.[132a]

THE 1946 FILIBUSTER

On January 6, 1945, Sen. Chavez had introduced a revised version of his 1944 bill to create a statutory FEPC, sponsored jointly by seven senators.[133] Following a second set of hearings held from March 12 to 14, 1945, the Senate Committee on Education and Labor, on May 24, 1945, reported out Sen. Chavez's FEPC bill favorably by a vote of 12 to 6.[134] No attempt was made during the rest of the year to bring the bill to the Senate floor. On December 21, 1945, however, just before the Christmas recess, Joseph Ball (Rep.-Minn.) told the Senate that he, H. Alexander Smith (Rep.-N.J.), and Wayne Morse (Rep.-Ore.) intended to force consideration of S.101 "early in 1946." Sen. Chavez at once announced that

[132] Sen. Morse accused the supporters of the FEPC of accepting a compromise which the agency's officials predicted would mean its end, 91 Cong. Rec. 7577 (July 12, 1945).

[132a] Although the Senate on April 26, 1946, added a special deficiency appropriation for FEPC of $27,600 to the Second Deficiency Appropriation Bill, H.R. 5890, 79th Cong. 2d Sess., this item was eliminated by the Senate-House conferees. FEPC's failure to obtain this sum to pay for the terminal leave of its remaining employees necessitated the abrupt termination of its existence on May 30, 1946.

[133] S. 101, 79th Cong. 2d Sess. (1946). The sponsors comprised the six senators who had introduced the 1944 bill (S. 2048, 78th Cong. 2d Sess., 1944) plus George D. Aiken (Rep.-Vt.).

[134] Calendar No. 286, Rep. 290, 79th Cong. 1st Sess. (1945); see the Washington Post (May 25, 1945). Sen. Taft was the only non-Southerner to vote with the minority, which included Senators Hill, Pepper, and Fulbright. The bill prohibited discrimination in employment or trade union membership by reason of race, color, creed, national origin, or ancestry and created a five-man commission appointed by the President to investigate complaints, hold hearings, and issue cease and desist orders enforcible in the courts. The bill was applicable to employers of six or more persons, engaged in operations affecting interstate commerce; government contractors; labor unions; and employment practices of all Federal agencies. The bill also required all Federal contracts to contain non-discrimination clauses and provided for a black-list of contractors violating the Act. Finally, the bill declared that the right to work without discrimination was an "immunity" of the citizens of the United States not to be abridged by any Federal or state instrumentality.

he would move to take up this bill "directly after Congress reconvenes."[135] The 79th Congress began its second session on Monday, January 14, 1946, and almost immediately (following a series of parliamentary maneuvers on both sides) became entangled in a protracted filibuster on the FEPC bill. This latest and most dramatic move in the parliamentary battle deserves close analysis.

The Senate rules are a model of liberality and simplicity, compared to those of the House. Precedents count for little in deciding questions of procedure and are rarely cited. Senatorial courtesy counts far more than any rule. The official manual containing the Senate rules is not even annotated, nor is there any recent collection of precedents.[136] There is a Rules Committee in the Senate, but unlike its House counterpart, it plays no part in arranging the order of business or the manner of debate. There is a calendar[137] upon which are entered bills reported favorably by a committee,[138] but any bill may be called from the calendar for consideration by the Senate regardless of its position thereon by a simple motion requiring a majority vote.[139] Once consideration of a bill has been voted, it can be disposed of only by a motion to consider another bill. The displacing motion likewise requires only a majority vote.[140] A bill may be discharged from committee by a simple majority vote requiring only one day's notice.[141] The rules allow the president pro tempore or presiding officer to name a senator to perform the duties of the chair in his absence,[142] and this designee may in turn delegate his duties to a successor. It is a common practice for the chair to be occupied successively by several senators during the day. The president pro tempore can however regain the chair any time he wishes.

On January 17, 1946, after the routine morning business was dispensed with, Sen. Chavez obtained recognition from the then presiding officer, Francis J. Myers (Dem.-Penn.), and at once moved that the Senate proceed to the consideration of S.101, the FEPC bill. Sen. Chavez took advantage of a little-used rule, which provides that motions for consideration made before 2:00 P.M. are not debatable,[143] and thus prevented a filibuster on the motion for consideration. Upon a roll-call vote his motion was car-

[135] 91 Cong. Rec. 12,680 (Dec. 21, 1945).

[136] See note 2, supra.

[137] Rule VIII.

[138] Rule XIV.

[139] Rule IX.

[140] Rule IX.

[141] Rule XXVI; see Gilfry, op. cit. supra, note 2, at 270; S. Jour. 238 (1922).

[142] Rule I, § 3.

[143] Rule VII. Robert M. LaFollette (Progressive-Wis.), enforced this rule by a point of order immediately after Sen. Chavez's motion, 92 Cong. Rec. 85 (Jan. 17, 1946).

ried 49 to 17,[144] and he then began to discuss his bill. At 3:42 P.M., however, Sen. McKellar moved the adjournment of the Senate until the next day, which motion was adopted by a voice vote.[145]

Failure to oppose this motion was the first fatal blunder of the friends of FEPC, a blunder which paved the way for the successful filibuster. Under the rules, the Senate may adjourn or *recess* each day. If it recesses, the prior legislative day continues, so that the *first* business on the next calendar day is the resumption of the unfinished business of the day before. If the Senate *adjourns*, however, the next day is a new legislative day and must begin with the reading and correction of the Journal and the transaction of other routine business. It would have been a simple matter for Sen. Chavez and his associates who had a majority on their side to have fought off all motions to adjourn and insisted upon a recess.[146] The motion to recess also would have enabled the utilization of another rule which hampers a filibuster. Rule XIX provides that no senator shall speak more than twice upon any one question in debate on the same day.[147] The question before the Senate on January 17 was the FEPC bill. If thereafter the Senate had continued to recess from day to day, the FEPC bill would have continued to be the "question in debate" and in time each of the twenty Southern filibusterers[148] would have spoken twice. Debate might therefore have been shut off without cloture.

Althouth the Southern senators were admittedly surprised on January 17,[149] they were fully prepared when the Senate reconvened on the 18th. Following the prayer of the Chaplain, Sen. Barkley, the majority leader, made the routine request (which, however, requires unanimous consent) that the Journal[150] of the prior day's proceeding be approved without read-

[144] 92 Cong. Rec. 85. Two Republicans sided with 15 Southern Democrats on the negative.

[145] PM of Feb. 6, 1946, reports an interview with Charles L. Watkins, the official Senate parliamentarian, in which the latter states that he "thought fast" and told Sen. McKellar to "adjourn the Senate" so that FEPC would no longer be the pending business on the next legislative day.

[146] Motions to adjourn or recess are decided without debate, Rule XXII.

[147] Except by leave of the Senate, which requires a majority vote and is not debatable. The "day" in the rule apparently means "legislative" day, S. Jour. 365 (1935).

[148] There are 11 Southern States: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia, but the late Carter Glass (Dem.-Va.) had been absent from the Senate for several years and Sen. Pepper of Florida was opposed to the filibuster.

[149] Sen. Russell stated that "the motion caught us flat-footed," 92 Cong. Rec. 168 (Jan. 21, 1946).

[150] The Journal is the condensed "official" report of the Senate proceedings, as distinguished from the Congressional Record, which is a verbatim transcript. In the early years of the Senate, there was no verbatim transcript nor any publication similar to the Congressional Record.

ing. John H. Overton (Dem.-La.) objected and then moved to correct the Journal to include therein the prayer delivered by the Chaplain on the preceding day. The tactical value of this motion was that it was debatable at length[151] and there is no easy way to bring the debate on this subject to a conclusion. The Senate of the United States, unlike almost every other parliamentary body,[152] does not allow a motion for the previous question.[153] Sen. Overton after a few references to the omission of the prayer began to debate the FEPC bill. Nor was there any way to prevent him from speaking on any subject under the sun while he had the floor, for the Senate rules do not require a senator's remarks to be germane or even addressed to the question under consideration.[154] It soon became apparent that a full-dress filibuster[155] was in progress. Sen. Overton was followed by Josiah W. Bailey (Dem.-S.C.) and thereafter by almost every southern Democrat. The Southern bloc made it clear that it was determined at all costs to prevent a vote on S.101.

On January 23, Senator Taft moved that Sen. Overton's motion to include the prayer in the Journal be tabled. This motion, which is not debatable,[156] was adopted by a vote of 48 to 28, but little was accomplished thereby. Clyde R. Hoey (Dem.-N.C.) at once moved another trivial correction to the Journal of January 17. The Senate could dispose of any motion by tabling it, but could not prevent another motion addressed to the same Journal. Sen. Pepper attempted a desperate measure. He objected to Sen. Hoey's remarks on the FEPC bill because they were not germane and, when Sen. McKellar, in accordance with the precedents, promptly overruled the objection, Sen. Pepper announced that he appealed from

[151] Rule III not only provides that the reading of the Journal may not be suspended unless by unanimous consent, but declares also that a motion to correct the Journal is deemed a privileged question until disposed of.

[152] The House of Commons has allowed the motion for the previous question since 1888, Campion, Introduction to the Procedure of the House of Commons (1929). For authoritative descriptions of British parliamentary procedure see May, Parliamentary Practice (13th ed., 1924); Redlich, Procedure of the House of Commons (English translation, 1908); Jennings, Parliament (1945).

[153] A final vote can be fixed for a specified time only by unanimous consent, under Rule XII § 3.

[154] Thomas Jefferson's Manual of Parliamentary Procedure, which at one time governed Senate procedure, provides (Sec. XVII): "No one is to speak impertinently or beside the question, superfluously, or tediously." This rule has, however, long been obsolete.

[155] For a history of filibustering, see Burdette, Filibustering in the Senate (1940). On January 18, Sen. Overton admitted: ". . . . I know, that if the bill were put to a vote at the present time by the Senate, it would be passed," 92 Cong. Rec. 123 (Jan. 18, 1946).

[156] Rule XXII.

the decision of the chair.[157] Such appeals are specifically recognized by Rule XX which provides:

> A question of order may be raised at any stage of the proceedings, except when the Senate is dividing, and, unless submitted to the Senate, shall be decided by the Presiding Officer, without debate, subject to an appeal to the Senate.

This bold stroke menaced the entire filibuster. If the Senate overrode the ruling of the chair and compelled Sen. Hoey to speak on the subject matter, Sen. Pepper could likewise have appealed other rulings of the chair and a majority of the Senate would soon have controlled the procedure. Sen. McKellar avoided the danger by a crude if effective expedient. He announced: "The chair does not consider the question raised by the Senator from Florida a point of order. . . . . A vote cannot be had upon the so-called appeal."[158]

Sen. McKellar's decision was tantamount to a holding that a majority of the Senate could not correct its rules by the device of overriding his ruling on a point of order. While difficult questions might arise if the Senate attempted to revise certain explicit written rules by this method, it is difficult to see why it could not reverse precedents of the past, based solely upon the traditions of the Senate. There is nothing in the written rules which either allows or forbids a senator to depart from the question under discussion in debate. Sen. Pepper was immediately followed by Sen. Taft who made the point of order that Sen. Hoey's motion was "frivolous." Sen. McKellar could with propriety either have overruled this unprecedented motion or submitted it to the Senate for decision. He did neither, but held that Sen. Taft could not make the point of order because, "the Senator would have to obtain the floor before making a point of order." This second ruling was directly contrary to what Sen. McKellar had himself said not less than five minutes before in disposing of Sen. Pepper's point. Sen. Pepper had asked: "In other words, while one senator has the floor, it is not possible for any other senator to raise a point of order?" To which Sen. McKellar replied: "Oh yes, it is possible." Sen. McKellar was, of course, wrong in overruling Sen. Taft's objection. Apparently, the only point of order which cannot be made while another senator has the floor is the point of lack of quorum.[159] Rule XX provides: "A question of order may be raised at any stage of the proceedings except

[157] The decision of the chair may be reversed by a majority vote, Gilfry, op. cit. supra, note 2, at 67, 76, 87.

[158] 92 Cong. Rec. 247 (Jan. 23, 1946).

[159] See remarks of Sen. McKellar, 92 Cong. Rec. 822 (Feb. 4, 1946).

when the Senate is dividing." Rule XIX, which is even more directly in point, provides:

> If any senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may call him to order; and when a Senator shall be called to order, he shall sit down, and not proceed without leave of the Senate.

The Senate was not in a mood, however, to challenge Sen. McKellar. At this point, as in other stages of the filibuster, the friends of FEPC, with only a few exceptions, showed no capacity for fighting back at the Southern bloc. Sen. McKellar thereafter was careful whom he designated to act as presiding officer. From January 18 through January 30, 1946, he relinquished the chair only to Southerners.[160] On January 25 H. Alexander Smith (Rep.-N.J.) pointedly observed: "I realize that those who oppose this measure control the chair."[161]

There remained the possibility of invoking the cloture rule. On February 4, Sen. Barkley was recognized[162] and filed a cloture petition signed by 48 senators.[163] Sen. Russell thereupon made the point of order that the business before the Senate was a motion to correct the Journal and not the FEPC bill, citing Rule III which provides:

> The reading of the Journal shall not be suspended unless by unanimous consent; and when any motion shall be made to amend or correct the same, it shall be deemed a privileged question and proceeded with until disposed of.

Sen. Barkley countered by arguing that the only pending "measure" before the Senate was S.101, which was the unfinished business of the Senate, a contention concurred in by Sen. Taft.[164] Sen. McKellar sustained Sen.

[160] The chair was occupied during this period by Senators McKellar, O'Daniels, Hoey, Hill, McClellan, Johnston, Ellender, Maybank, Eastland, Russell, and Stewart. Thereafter, it was plain that there was no mood to resist their filibuster.

[161] Sen. Mead, who vainly sought recognition while Sen. O'Daniel was presiding, accused the chair of recognizing Sen. Eastland, although the latter was in his seat while the New Yorker was on his feet, 92 Cong. Rec. 95 (Jan. 17, 1946). Rule XIX provides that the first Senator to address the presiding officer shall be recognized.

[162] Sen. Stewart then occupied the floor, but Sen. McKellar, citing two Senate precedents of 1925 and 1927, held that the former's possession of the floor must be yielded to Sen. Barkley so that the latter might file the cloture petition.

[163] The list of signers appears in 92 Cong. Rec. 822 (Feb. 4, 1946). Of the 48 signers, 23 were non-Southern Democrats, 23 Republicans, 1 a Southern Democrat (Pepper), and 1 a Progressive.

[164] Sen. Barkley also argued that when 2 o'clock arrived, the morning hour "automatically" concluded and made in order the unfinished business. Rule IX does provide that "not later than 2 o'clock" the calendar "shall be taken up and proceeded with." The rule conflicts with Rule III making the correction of the Journal "a privileged question, and proceeded with until disposed of." Sen. Taft, during the debate on the applicability of the cloture petition, argued that at 2 o'clock, the correction of the Journal should go over until next day. But no one, from January 18 to February 4, objected to the consideration of the Journal after 2 o'clock.

Russell's point of order and held that the "business now pending before the Senate" was not S.101 but the correction of the Journal, and that the latter business was of the highest privilege and could not be suspended until disposed of. Sen. Barkley then took an appeal to the Senate to uphold "the right of the Senate to pass upon its own rules." The Southern bloc was prepared for the appeal. When Sen. McKellar announced correctly that the appeal was debatable, Sen. Stewart began to filibuster on the appeal. And so for four more days, the debate on S.101 technically took place in the course of an appeal from the ruling of the chair.[165] The Senate thus found itself in a difficult, but not impossible, situation. A resolute group could have filed a cloture petition to limit debate on the appeal,[166] but Sen. Chavez was by now ready to admit defeat.

On February 4, the knots that had snarled up the Senate for three weeks were untied. Sen. Barkley withdrew his appeal, Sen. Hoey withdrew his motion to correct the Journal of January 17, Sen. Barkley moved to approve that Journal (which was agreed to by unanimous consent), S.101 became the unfinished business of the chamber, Sen. Barkley filed his cloture petition, and Sen. McKellar, pursuant to the rule, fixed a definite hour two days later for the vote on the cloture petition. The reason for this sudden tactical withdrawal by the Southerners was obvious to all. They had counted noses and were mathematically certain that Sen. Chavez could not muster the necessary two-thirds vote to impose cloture.[167] In return for allowing a vote on cloture, Sen. Chavez had agreed to restore the FEPC bill to the calendar, if cloture were defeated. On Saturday, February 9, the vote on cloture was defeated by a vote of 48 to 36, 24 less than the requisite two-thirds. Of those favoring cloture, 22 were non-Southern Democrats, 25 were Republicans, and 1 was a Progressive. In addition, 2 Democrats and 4 Republicans were paired in favor of the bill[168] and 1 absent Democrat was announced as favoring cloture. Of the 36 negative voters, 19 were Southern Democrats, 9 non-Southern Democrats, and 8

[165] The debate on an appeal from a ruling on a point of order need not be germane. S. Jour. 16 (1937).

[166] Sen. McKellar had cited precedents to indicate that cloture was applicable not only to pending measure, i.e., legislative acts, but even to resolutions, parliamentary actions, or to "business" pending before the Senate, 92 Cong. Rec. 824 (Feb. 4, 1946).

[167] On January 21, 1946, Sen. Russell asserted: ". . . . there will never be a vote on cloture unless we know beyond peradventure that the motion for cloture will be defeated," 92 Cong. Rec. 170 (Jan. 21, 1946).

[168] Pairing is simply a device whereby absent Senators or Representatives may record their position on questions. Such "votes" are not considered in determining the results of a decision since no proxy or absentee votes are allowed on the floor of either House.

were Republicans.[169] As part of the agreement, Sen. Chavez then moved to displace S.101 in favor of an appropriation measure. This motion was adopted 71 to 12. The FEPC bill was restored to the calendar where it will, in all likelihood, remain until the next session of Congress, in January, 1947.[170]

Cloture was defeated because a small group of senators from non-industrial States refuse on any issue to vote for it. The absence of an effective means of limiting debate of course increases the influence and power of any one senator. A senator may by the mere threat of what is diplomatically called an extended explanation often compel a deference to his views. When a bloc of senators is determined to fight for a point of view, the vast majority of the Senate must yield and seek some compromise or face a legislative log-jam. Thus the mere threat of unlimited debate affects senatorial, and particularly committee, action. The cloture rule was first adopted in 1917, following President Wilson's denunciation: "A little group of wilful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible."[171] Since then cloture has been evoked successfully only four times.[172] On the other hand, since 1917 cloture has been defeated no less than eleven times. The anti-lynching bill was filibustered to death in 1922 and again in 1938. The anti-poll-tax bill was successfully filibustered in 1942 and 1944, despite the fact that each time it has passed the House. But filibusters have been broken without invoking the cloture rule. The friends of FEPC made only half-hearted attempts to break this one. The struggle against the filibuster seemed to many political observers a sham, if not a fraud.[173] The supporters of the FEPC on both sides of the aisle conducted the fight in a Marquis of Queensberry atmosphere. Every courtesy was extended to the opposition and no effort put forth to make their task more difficult. To many, the struggle of the FEPC bloc seemed almost like a political chore, a disagreeable duty to be got over with as

[169] Carter Glass (Dem.-Va.) was the only senator whose vote or position was not announced. For the House rule, see Cannon, op. cit. supra, note 2, at 224.

[170] If, however, the discharge petition on the House FEPC bill (H.R. 2232, 79th Cong. 1st Sess., 1945) is successful, the Senate Committee on Education and Labor will have to decide whether it will report out the House bill and face another filibuster.

[171] New York Times (March 5, 1917). The statement was made on March 4, but not as part of the inaugural address. Pres. Wilson was attempting to break the filibuster blocking the passage of his armed-ship bill.

[172] To limit debate on the Versailles Treaty (1917), the World Court (1926), the branch banking bill (1927), and the bureau of prohibition bill (1927). For a legislative history of the cloture rule in the Senate, see 92 Cong. Rec. 655 (Jan. 31, 1946).

[173] See Arthur Krock's column in the New York Times, February 14, 1946.

soon as possible. A flabby majority could not expect to beat down a determined filibuster.

During the eighteen days which this filibuster consumed, not a single evening or Saturday session was held, although more aggressive friends of the FEPC such as Sen. Morse repeatedly insisted on such meetings.[174] Sen. Chavez, the FEPC floor leader, and Sen. White, the minority leader, had agreed, and had publicly announced that they would attempt, to keep the Senate in session at least until 6 P.M. each day, but their resolution faltered.[175] Filibusters are broken by long sessions in which the obstructionist's vocal cords are worn down and dilatory motions defeated. But Sen. Chavez and his associates time and time again allowed speakers on the floor to yield for time-consuming (and body-resting) quorum calls[176] which were not in order without unanimous consent.[177] On one day, January 28, unanimous consent was obtained three times for such interrupting quorum calls, and on February 1, twice.[178] Another indication of the Chesterfieldian attitudes which prevailed during the debate was the manner in which unanimous consent was frequently granted to allow a senator to yield the floor temporarily while another senator held forth on some extraneous matter.[179] Of course, each of these interruptions only consumed that much more time and allowed the Southern bloc that much more rest.[180] No thought seems to have been given to the possibility of amending or suspending the rules (which require a two-thirds vote),[181] although in one historic filibuster in 1891 on the so-called Force bill, the Senate sustained the ruling of the presiding officer that a motion to amend the rules

[174] 92 Cong. Rec. 358, 428, 538 (Jan. 24, 25, 29, 1946).

[175] On January 23, both senators agreed to a recess at 4:40 P.M., on February 4, Sen. Chavez moved a recess at 4:14 P.M., and on February 5 at 4:34 P.M.

[176] 92 Cong. Rec. 345, 392, 715 (Jan. 24, Jan .25, Feb. 1, 1946).

[177] See note 159, supra, and accompanying text. Huey Long was taken from the floor during his filibuster of June 12–13, 1935, by yielding for a purpose other than a question; see also Burdette, op. cit. supra, note 155, at 185; S. Jour. 392 (1932).

[178] 92 Cong. Rec. 442, 459, 467, 715, 733 (Jan. 28, Feb. 1, 1946). Some of these quorum calls were out of order, because they were repeated without intervening business, mere debate not being considered business; see S. Jour. 362 (1943); S. Jour. 497 (1942).

[179] Thus on January 28, Sen. Murray was allowed to interrupt to discuss the UNO, 92 Cong. Rec. 460, 466 (Jan. 28, 1946); on January 29, Sen. Wherry was allowed to interrupt to discuss the plight of German nationals, 92 Cong. Rec. 527–537 (Jan. 29, 1946).

[180] The Senate has not always been so considerate of a filibusterer's feelings. The Huey Long filibuster of May 21, 1935, was broken by the successful objection that Huey Long had lost the floor by leaving it during a quorum call. Burdette, op. cit. supra, note 155, at 105. Burdette refers to one filibusterer who was forbidden to rest on his desk while speaking.

[181] Rule XL.

is of higher privilege than a motion to correct the Journal of an earlier day.[182]

CONCLUSION

Unquestionably, the failure of the FEPC was not solely due to antiquated rules of parliamentary procedure. The opposition to the FEPC was reflected not only in the well-organized Southern bloc but also in the apathy and uncertainty which characterized those who claimed to be supporters of the legislation. Thus, the parliamentary history of the FEPC does not necessarily contradict the assertion of the House Parliamentarian that a majority "may work its will at all times in the face of the most determined and vigorous opposition of a minority."[183] The FEPC could count upon neither a real majority nor the leadership in either House for a determined stand.

The history of FEPC does, however, suggest the need for the two changes in the rules which will at least facilitate the bringing of the issue under consideration before the entire House or Senate for a decision. There must be a curb upon the opportunity to filibuster in the Senate, and an escape from the domination of the Rules Committee in the House.

These reforms will not be easy of achievement. The Joint Committee on the organization of Congress[184] which has just issued its recommendations[185] for overhauling Congress was not empowered to investigate the rules of either House. Desirable as its proposals are for the reduction of committees, the creation of Congressional responsibility for a legislative program and the strengthening of the research agencies of Congress, none of these recommendations relates to the parliamentary rules of procedure.

The Senate is a continuous body and unlike the House its rules are not adopted at the beginning of each Congress. (The present Senate rules were adopted in 1884 and since then only five major amendments have been adopted.) Strengthening the cloture rule means, therefore, the introduction of a resolution, its referral to the hostile Committee on Rules, 9 of whose 13 members voted against cloture during the FEPC filibuster, and its adoption by the Senate. But difficult as the task is, President Wilson in

[182] 22 Cong. Rec. 1656–1784 (1891). This ruling is not, however, squarely in point, for the Journal under discussion was the Journal of January 20, 1891, and the Senate had adjourned on January 21 without disposing of that motion. [The motion to correct the Journal of January 20 which was debated on the calendar and legislative day of January 22 was perhaps therefore not "the Journal of the preceding day" within the meaning of Rule III, § 1.]

[183] Deschler, op. cit. supra, note 2, at vi.

[184] Appointed pursuant to H. Conc. Res. 18, 79th Cong. 1st Sess. (1945).

[185] Report No. 1011, 79th Cong. 2d Sess. (1946).

1917 was able by marshaling public opinion to compel the Senate to adopt the cloture rule by a vote of 76 to 3, thus breaking a tradition of unlimited debate which had existed since 1789.[186] What the Senate requires is a rule easily invoked which can limit debate in a reasonable manner. A majority of the Senate should have the power to limit each senator to one hour's debate on any bill, resolution, motion, or other question, or portion thereof, pending before the Senate. The rule should provide that upon the filing at the desk of the presiding office (thus eliminating the necessity for recognition) of a petition signed by sixteen senators, the first order of business upon the next calendar day immediately after the Chaplain's prayer shall be a debate on the cloture petition limited to one hour. At the end of this hour, the vote shall be taken. If cloture is agreed to, all amendments and all dilatory motions shall thereafter be out of order, all points of order shall be determined without debate, and all debate shall be germane until all time under the cloture rule is exhausted.

The House Rules require a reform, equally drastic, but much more capable of achievement. If the discharge rule is amended so that a smaller number than 218 is required to bring a bill out on the floor, democratic process in the House will be strengthened. A quorum of the House is 218 and a majority of that quorum is sufficient to adopt any measure. It is anomalous that a much larger number of representatives is required merely for the purpose of bringing a bill out on the floor for consideration. A substantial minority of the House is entitled at least to a roll-call vote on any issue which it considers vital. The discharge rule has not always required the signature of 218 members. In 1924, when for the first time the rule provided for a minimum of signatures, the requisite number was only 150.[187] Two years later it was increased to 218, but in 1931 it was again reduced, this time to 145, at which point it remained for four years. On January 3, 1935, it was again increased to 218, a figure which has remained constant since then. It should be fixed at 110, a majority of a quorum.

The House rules are adopted at the beginning of the first session of a new Congress. On January 3, 1947,[188] a majority of the House, by this device, can free itself from the domination of the Rules Committee. Thereafter the signing of a discharge petition containing the requisite number of signatures will prevent any committee from bottling up legislature, will compel the Rules Committee to provide an opportunity for a vote on such

[186] From 1789 to 1807 a motion for the previous question was recognized in the Senate, but its purpose was not to shut off debate. See Haynes, op. cit. supra, note 2, at 397.

[187] See Riddick, op. cit. supra, note 2, c. 13.

[188] This day is fixed by the United States Constitution, Amend. XX, § 2.

legislation, and may block "gag" orders by which the Rules Committee artificially constricts the procedure of amendment on the House floor.

The apparent lack of parliamentary discipline and the evidence of questionable parliamentary ethics may suggest the need for additional stringent controls and, perhaps, the creation, as in the House of Commons, of a non-political speaker.[189]

Questions as to "legislative intent" which frequently trouble the courts and the writers[190] appear even more complex in light of the gyrations, compromises, and pushing and filling which are integral parts of any controversial bill. The usual techniques of legal analysis seem either inappropriate or inadequate to explain this part of the American legal system. This may explain in part the failure of the legal writers to subject to critical discussion the impact of parliamentary procedure upon the substantive law. There appears to be no other reason why this area of the law should remain the exclusive domain of the political scientists.

[189] The Parliamentary history of FEPC poses troublesome questions beyond the immediate scope of this article. To those inclined to speculate upon the relationship between the legislature and the judiciary, the FEPC history affords material for further speculation. In the vague realm of "public policy" what is the significance of the failure to enact such legislation as the FEPC? Is the legislature the only forum in which issues should be decided or should the courts exercise less restraint in constructing a body of rules to govern what appear to be rather basic human rights? See 13 Univ. Chi. L. Rev. 477 (1946).

[190] See, for example, Diamond, The Webb-Pomerene Act and Export Trade Associations, 44 Col. L. Rev. 805, 810–11 (1944), where the author attempts, by reference to the Congressional debates, to construe the intent of the framers of that act.

THE ENFORCEMENT OF COLLECTIVE LABOR AGREEMENTS BY ARBITRATION*

CHARLES O. GREGORY†

IN SPITE of the developments in labor relations and collective bargaining over the last ten years, it is safe to say that there is still no settled American law governing the status of collective labor agreements and their enforceability. This case of arrested development may not have been particularly serious before 1935, when the NLRA became law. But now that the government has committed industry to a far-reaching program of virtual compulsory collective bargaining, we must establish some feasible techniques for the interpretation, application, and enforcement of collective agreements.

One explanation of the absence of such a development may be that the enforcement of contracts has traditionally been a concern of the states, and they have unfortunately followed no trend toward a uniform theory adapted to the adequate settlement of claims arising from collective agreements. Nor are they in a position to do so effectively. On the other hand, Congress has created the conditions that have resulted in thousands of new collective agreements, and it is in a position to provide some uniform method for their application and enforcement. It is true that under our federal-state system of government, Congress is traditionally supposed to keep its hands off of matters pertaining to the interpretation and enforcement of contracts. But we are faced with a practical and unprecedented situation of Congress' own making. And it may have to provide the solution by exercising the same powers with which it created the NLRA in the first place—the cause of these numerous collective agreements.

The use by Congress of its commerce power seems most appropriate in this situation. Many present-day collective agreements have very decided interstate implications, some of them covering the various units of industrial empires which spread from coast to coast. It is certainly as tenable to suppose that Congress has the constitutional power under the commerce clause to provide a uniform method for the administration of these collec-

*[A chapter from Labor and the Law, to be published in the late summer of 1946 by W. W. Norton & Company, New York. Although this volume is intended for lay readers, it is believed that the author's observations on arbitration merit the attention of the legal profession.—Ed.]

† Professor of Law, University of Chicago Law School.

tive agreements as it was to assume that it could originally impose on industry under the NLRA the conditions which led to universal organization and collective bargaining. If it were necessary to guarantee independent organization and collective bargaining for the purpose of protecting commerce from the disruptive effects of strikes concerning organization and recognition of unions, then it is equally necessary to protect commerce from the ravages of disputes concerning the application and enforcement of the resulting agreements.

Congress and the state legislatures have so far refrained from spelling out any procedures for the enforcement of collective agreements. They have left that job to the courts, and the judges have the most rudimentary notions about what is required. But even if the courts had clearer conceptions of an adequate procedure, there are good reasons why they could do little about it without the aid of legislatures. One reason is that labor unions have no separate legal status such as corporations enjoy. Since they are not persons in the eyes of the law, they have no standing before the courts as parties in suits to enforce contracts or as parties being sued under their terms. In many states, unions may enjoy the benefits of legal personality through incorporation, as long as they are willing to assume the responsibilities which such a step entails. A few unions have already found it convenient to incorporate. But most of them seem reluctant to abandon some of the advantages of loose and informal association and look with suspicion at the consequences of incorporation, such as disclosure of their internal affairs. This situation can be corrected only by legislation creating a status for unincorporated unions as legal persons, to sue and be sued without the formality of incorporation. In the absence of such legislation our courts may simply decide to treat unions as legal persons for certain purposes, as indeed a few have already done. But this involves a process of judicial legislation which few courts relish and which affords no promise of a uniform development fitted to the needs of the occasion.

Another reason for the rudimentary development in our common law regarding the enforceability of collective agreements is the tendency of lawyers and judges to think about these agreements in terms of conventional contract law. In a sense they *are* contracts. But, strictly speaking, they are not contracts at all in light of what that term traditionally signifies. As one court has said, the collective agreement "resembles in many ways a treaty."[1] This characterization is exceedingly apt. For the rigors of collective bargaining with strikes, boycotts, and picketing frequently

[1] Yazoo & M.V.R. Co. v. Webb, 64 F. 2d 902, 903 (C.C.A. 5th, 1933).

suggest warring factions, each anxious to make peace with the other on a basis of selfish personal advantage. Indeed, the highest court in England has supported this analogy by declaring that collective agreements are not enforceable in a court but only by the immediate parties,[18] fairly implying that unions can hope to secure compliance with their terms only by striking. This counsel of despair sacrifices most of the stabilizing advantages inherent in written collective agreements. For if these undertakings fail to keep the parties on a fairly businesslike basis of mutual give and take, much of their contribution to civilized progress is lost. Fortunately, our courts do not share the hopeless attitude of the House of Lords, although their attempts to provide redress under these agreements are still far from satisfactory.

Judicial developments in this country concerning the enforcement of collective agreements fall roughly into three categories—none of them according to an unincorporated union, as such, actual participation in litigation. Under one category, collective agreements between a union and an employer result in a *custom* or *usage* which is to be reflected in the individual "contracts" of employment made by each worker with the employer.[2] This theory implies the nonexistence of any contract between the union and the employer—a view possibly explained by the fact that under judicial conceptions of its status, the union is not in a position to offer any obligation in return for the benefits conceded by the employer. Practically, the agreement becomes effective only when each individual employee contracts with the employer to receive for his labor the terms of employment which it recites. Generally, this means that each employee must have the terms of the agreement in mind when he is hired and must stipulate that they are to control in his case. It is really inaccurate to call the individual employment relationship a contract, since each worker is actually employed only at the will of his employer. Of course, an employee suing for back wages always brings suit on the theory of an implied contract to pay him the value of his services. If he cannot prove an agreement to pay so much per unit of time worked, the jury fixes a fair value.

If, however, the employee bringing suit has worked under a collective agreement, then according to the custom or usage theory he may look to that agreement for the terms covering his employment, as long as he can prove that he had such terms in mind when he was hired. Apparently it makes little difference under this theory that an employee claiming the benefits of a collective agreement does not belong to the union—at least if

[18] Young v. Canadian Northern R. Co., [1931] A.C. 83.

[2] Hudson v. Cincinnati R. Co., 152 Ky. 711, 154 S.W. 47 (1913).

the agreement does not specify that its terms cover only members of the union. Such stipulations are rare, if they exist at all. But whether or not he is a member of the union, only the employee claiming rights under the agreement may enforce such rights by court action. The union has no rights under the contract which it may have enforced at law. It is free to help the individual prosecute his law suit. But it may procure enforcement only through the more primitive self-help method of striking.

A second category for the judicial enforcement of collective agreements—the *agency* theory—is no improvement on the custom or usage theory. According to this approach, a union acts as the agent of its members to bargain with the employers over the conditions of their labor.[3] Courts accepting this theory unfortunately attempt to apply the conventional rules of law governing agency relationships in the business world. Hence they assert that the union, as such, is not the real contracting party, since it is only an agent. Here again, only individual employees with grievances may press claims under the agreement, their ultimate recourse being personal litigation in the courts. And since they theoretically bring suit as "principals" of the agent union, only members of the union may secure from the courts compliance with the terms of the agreement. Presumably members employed after the agreement has become effective may not acquire rights until they have ratified its provisions. And for that matter, in the absence of a clear-cut principle of majority rule such as we know it today under NLRA developments—either stated in the union's constitution and effected thereunder by a vote of the membership ratifying the bargained agreement or arbitrarily imposed by the courts—any member may disclaim a term of the agreement or repudiate a subsequent collectively bargained adjustment affecting his rights, unless his personal ratification was secured.

Little hope lies in the trend toward the third category for the judicial enforcement of collective agreements—that called the *beneficiary* theory.[4] Under this development, copied directly from conventional contract law prevailing in some of our states, a union enters into a contract with an employer for the benefit of those workers whom the contracting parties intend to cover. Although the employees benefited are not parties to the contract at all, they may nevertheless secure judicial enforcement of its terms under this theory. Here the union is necessarily a party to the collective agreement, although many unions so recognized under this theory

[3] See Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572, 594 (1931).

[4] Ibid., at 596 et seq.

have no separate legal personality except that lent them by the courts in order to make the theory work.

Under this theory an employee may secure judicial enforcement of the collective agreement in his own behalf even if he is not a member of the union, as long as he can show that it was the intention of the contracting parties to allow him the benefits of the contract. But this theory, like the others, is hopelessly involved with legalistic paraphernalia, bad enough in the contexts where it was originally conceived and utterly out of place in the field of labor relations. The third party beneficiary theory in the law of contracts—a far from universally accepted piece of judicial legislation, adapted to the intricacies of mortgages and suretyship—provokes the most ridiculous legalistic speculations when it is grafted onto the field of labor relations.

It is not profitable to discuss further any of these judicial theories. Some consideration of them was necessary to show the futility of adapting common-law principles, developed for another purpose, for use in the labor relations field. It is probably unfair to blame our courts for having done no better, since they are not supposed to cut new paths. Their function may include occasional stretching of legal principles to encompass new situations. But the social change has been too rapid and violent in ths field to allow for the slow process of judicial adaptation. Even if judges were inclined to cut through the conventional legalisms and achieve rules to govern the enforceability of collective agreements, they are not expert in labor matters and would probably disagree among themselves as to how they should be handled. Furthermore, they would not have the power to set up effective ancillary procedures like arbitration. These common-law theories which they developed are inadequate because they do not allow for suits by unions against employers nor for suits by employers against unions and individual employees under these agreements.

What we need immediately is a thoroughgoing legislative treatment specifically designed to make collective bargaining and the resulting agreements work smoothly and efficiently. And the less such legislation depends for its measures on the conventional law of contracts, the better it will be. Perhaps it would be wise for legislatures to assume in this task that collective agreements closely resemble treaties of peace, requiring sanctions to compel all parties concerned to observe their freely made commitments. They might, indeed, bear in mind Justice Jackson's observation, in his opinion in *J. I. Case Company v. NLRB*[5] that the term "trade agreement" is more appropriate than "contract," as well as his

[5] 321 U.S. 332 (1944).

suggested analogy between these agreements and certain types of fixed schedules of terms controlling individual contracts. In this recent case he likened these collective labor agreements, in their practical effect at least, "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."[6] He also called attention to the fact that in some European countries a privately negotiated trade agreement of this sort, when approved by an appropriate government agency, becomes a "governmental regulation ruling employment in the unit." Apparently he envisioned individual employment relationships—contracts of employment, if that is preferred—created between employer and employee, automatically including the terms set forth in the controlling trade agreement.

Legislatures should note that Justice Jackson was suggesting only a rough analogy between collective agreements on the one hand and tariffs, standard provisions, and rate schedules on the other. Unlike these situations, collective agreements are bargained out between private persons—unions and employers—who regard themselves as parties to these agreements, with rights and obligations apart from those of the individual employees. The final agreement is intended to reflect the mutual intentions of the parties, indicating that which each was able to secure from the other in a series of horse trading conferences which involved all sorts of concessions and compromises. The extent to which this might be true naturally depends on the relative bargaining strength of the parties—the willingness and ability of the union to strike and the ease with which the employer might resist such pressure. On the other hand, to pursue Justice Jackson's analogy, the terms of a collective agreement are usually applied to all employees in a unit.

However a legislature may go about setting up a procedure for the application and enforcement of collective labor agreements, it is faced with the fact that thousands of these agreements now exist in some sort of practical working order. Collective bargaining practices now in everyday use are far ahead of anything the courts and the legislatures have ever conceived or even pondered about. Hence, projected legislation will have to be planned in accordance with these developments, reflecting many of the techniques already adopted by employers and unions as well as some of those imposed by the National War Labor Board.

[6] Ibid., at 335.

For instance, in the garment and soft coal industries, the employers and unions concerned have long since worked out for themselves fairly adequate procedures to dispose of contentious issues arising under their collective agreements. In each, the collective agreements involved are either industry wide or cover large blocks of an industry in a particular locality, usually master agreements between associations of employers on the one hand and national unions of affiliated locals on the other. While the garment industry has tended to secure the interpretation and application of master contracts through the use of a privately retained impartial umpire, the soft coal industry depends on the decisions of regional joint boards composed of employers and union representatives, with ultimate recourse to arbitration, if necessary. But these are voluntary arrangements. Their success lies in the civilized determination of the contracting parties to make them work, as the only practical alternative to chaos. They amount to a type of self-government, without legal sanctions, existing within a political government which should provide adequate sanctions to insure the operation of such arrangements throughout industry in general.

The first thing to decide in any projected legislative program concerning collective bargaining agreements is whether or not the collective bargaining process should itself be regulated. This process, which results in collective agreements, must be considered in sharp contradistinction to the application and enforcement of such agreements after they are once achieved. Regulation of the collective bargaining process happens to be one of the most fundamental issues in the contemporary labor relations field. Traditionally in this country the private parties concerned have conducted the negotiation of collective bargaining agreements, government having intervened through mediation and conciliation merely to get the parties together on some mutually satisfactory compromise basis. The backbone of collective bargaining has always been economic coercion, which includes union recourses like strikes, boycotts, and picketing, as well as employer recourses like shutdowns, lockouts, and farming out work. Naturally, a good deal of collective bargaining takes place around a conference table, but those who believe that such parliamentary procedure is all there is to collective bargaining are just kidding themselves. Possibly the word "bargaining" is a misleading term for this whole process, and terms like "hold up" or "starve out" may be more accurate. But such speculation seems beside the point at this late date.

A question of primary political importance is whether or not employers and unions are willing to abandon their traditional techniques of bargain-

ing in exchange for the terms of employment which some appropriate government agency might believe suitable. And if they are not willing to abandon these traditional techniques, should they be made to do so in the general public interest? Although these speculations might not have been taken seriously before the war, they must now be carefully considered in view of the remarkable performance of the War Labor Board. That board's function was to do the collective bargaining for employers and unions who could not manage to do their own. It undertook this task on the assumption that a nation at war could not afford the disruptions which the traditional collective bargaining process might occasion. Its success was due largely to the fact that employers and unions co-operated in accepting and following the policy pronouncements and decisions of the board. Many people have been so favorably impressed by this experience that they would like to see something of the sort set up as a permanent institution. But there are a number of angles they may have overlooked.

In response to the first question above, it seems unlikely that many employers or unions would wish to abandon the traditional techniques of collective bargaining. Most employers would probably like to see the economic bargaining devices of unions completely abolished by law, but they know that this is politically impossible. Indeed, most of them would regard as highly undesirable the only form of government which would make suppression of that kind possible. Quite obviously, the unions do not want to give up their traditional bargaining techniques like the strike. Some employers and a few union leaders might be willing to take a chance on government-imposed collective agreements, but only on the gamble that a particular political administration would lean more toward their side than the other. This possibility of politically influenced bias, however, is probably what makes most employers and labor leaders nervous about government-conducted bargaining. They would vastly prefer to take their chances on private bargaining, even with all the trouble that that choice inevitably entails.

As to the second question, in the absence of a paramount national emergency it is almost impossible to justify governmental assumption of the collective bargaining function, even for the purpose of obviating the wasteful and disruptive strikes and boycotts associated with private bargaining. This is so, chiefly because there are no known standards by which government supervised collective bargaining can be conducted. Naturally, standards of some sort could be adopted by Congress. That is what everybody is afraid of. If it goes that far, Congress might just as well fix prices and wages and be done with it. We could, of course, have our economists draft standards to govern collective bargaining.

Then the questions would arise: Which economists? And, who would select them? Would they be those reflecting employers' beliefs, those reflecting the sentiments of organized labor, or those reflecting one of the intermediate philosophies? Would the test of competing economic theories be their relative worth, if there be anyone to make the choice, or would it be a show of hands on the floors of Congress? In a country whose only labor policy so far is to have no labor policy, these would be difficult questions to answer. Indeed, any answer would imply a kind of regulation completely at war with the prevailing notions of free enterprise so deeply entrenched in the minds of both employers and organized employees. Each group would like regulation of the other, even if that meant some invasion of free enterprise; but, in the last analysis, they would all agree that complete free enterprise for every economic undertaking is better than none for anybody.

Naturally, a middle course suggests itself. And it is no idle speculation to foresee the possibility of something like the "codes of fair competition" current in the NRA days of 1933. This time, however, the main object would be to fix uniform labor standards throughout the various industries, with allowances for local and regional variations warranting occasional differentials. And organized labor would enjoy parity with the employers in establishing these industry-wide codes. Inevitably, an undertaking of this kind would require price-fixing of commodities, and the distinction between such a setup and a planned, noncompetitive economy by direct legislation would be hard to discern. One obvious distinction might win the approval of some employers and labor leaders. In a scheme of this sort the bargaining function would still be present, making it possible for employer and employee groups to negotiate compromises. The final result would be called a collective agreement. The only possible catch might be that the government would resolve all failures to reach decisions, a factor which might easily keep one side or the other from committing itself, depending on the known political temper of the administration in power. And since such arrangements would necessarily have to cover entire industries, the expectation of securing a united labor front through unions now competing in the same field seems hopeless.

ISSUES ARISING UNDER COLLECTIVE AGREEMENTS—GRIEVANCES AND THE INTERESTS OF NONMEMBERS

Although it may be incorrect to assume that projected legislation will not include government regulation of the collective bargaining process, this assumption is necessary for a profitable inquiry into the application and enforcement of collective agreements. Any legislation concerning this

intensely practical matter must be carefully adapted to practices already established either by custom between employers and unions or in accordance with the law. For instance, it will have to provide that all members of a given bargaining unit are covered by any collective agreement negotiated, since the NLRA already stipulates that the bargaining agency selected by a majority of the employees in a unit is the exclusive bargaining representative for all of them. And new legislation of this type should reflect all implications of the majority rule idea if it is to be completely consistent with the policies of the NLRA. Practically, this means giving unions a separate legal identity for all general purposes—to contract, to sue and be sued—possibly subject to their having registered with some state or federal agency in accordance with certain stipulated formalities. Or it could mean establishment of a series of specified detailed union privileges covering the same ground, not subject to modification through judicial interpretation but less flexible in their application than more generally described powers. Incidental to this, unions must be allowed to bind all employees in the units they represent, whether such employees be members or nonmembers, to any commitments they may negotiate with the employers concerned.

Many may think this last provision an extraordinary power to grant a union over employees' vested interests, such as accumulated seniority rights of great value to them. But unless unions have this power, assuming that they must use it impartially for the benefit of the employees as a whole, they will not be able to operate for the best interests of all concerned. A possibly unusual illustration—a situation which has nevertheless actually occurred in the railroad industry—indicates why this is so. Suppose two companies of equal size, producing the same kind of goods and having adjacent plants, decide to merge into one company, whether for purposes of efficiency and general economy or for other reasons. A part of this merger may be a consolidation of similar departments in order to avoid duplications of machinery, transportation, and supervision. Also assume that each company had been under separate but practically identical collective agreements with the same union. Omitting any consideration of how necessary reductions of the working force might be effected, how would the seniority list in a given department of the new company be drawn, assuming that the personnel in the formerly separate departments were placed together in the new consolidated department?

Presumably, the union could cancel the old contracts and negotiate another with the new single employer. If it did this, could it negotiate a new seniority list for the department in question, dovetailing the two old

lists so that the service of each employee in the new department is properly reflected in his relative position on this list? Many of the individual employees would no doubt complain, if this were done, that they have lost their positions of relative advantage on the seniority list. Thus, one who had been tenth on the old list in his former job, now may be eighteenth on the new list. Actually, he would have gained by the change, assuming that the new department is just twice as large as either of the old ones, although this factor should be immaterial if his relative length of service is accurately stated. At any rate, if the union were not allowed this power to negotiate reasonable adjustments over the objections of the employees concerned, adequate collective bargaining in this instance would become impossible.

It might be thought necessary in a case like this to allow the individual employees an opportunity to secure a judicial declaration of what should have been done and whether their relative seniority positions should have been maintained, but this would seem most unfortunate. Naturally, these employees should have the opportunity to prevent an arbitrary disposition to their rights, just as minority stockholders of a corporation may complain of the unwarranted excesses approved by the majority. But that is far different from substituting a court's notions of proper collective bargaining for those authorized by legislation. In such a situation, the court should be confined to reviewing the union's exercise of authority, remaining free to declare the particular negotiation an excess of power only if it found that the union and the companies had exceeded the scope of bargaining authority set forth in the statute. And similar treatment would be appropriate for other kinds of negotiations between a union and an employer, such as agreeing to a wage cut in the face of adverse economic conditions otherwise endangering continuation of operations. For it would seem that a far-reaching application of the majority rule principle is imperative to successful collective bargaining, even if it means vesting *all* bargaining power and representation in the unions, leaving the employment interests of individual workers completely in their hands. If any of the employees dislike the representation that a majority of their fellows have selected, they are always free to campaign for another union or for no union at all, or to find work elsewhere.

Acceptance of these conclusions should not imply a denial of opportunities for individual employees in bargaining units to secure redress for violations of their established rights under collective agreements. Certainly such opportunities should be available to all individual employees, but great care is necessary to determine what these rights are, how they arise,

and a practical procedure for their adequate enforcement. Any claims asserted by individual employees working under a collective labor agreement will presumably be made against their employer. Among such claims would naturally be included demands for wages earned but either not paid at all or not paid in proper conformance to the established rate, to the number of hours worked, both straight time and overtime, or to the scheduled job classifications. Inasmuch as claims of this type are more or less routine—frequently arising from bookkeeping errors in the employer's office, in time reports submitted to the office, and in particular employees' own faulty memoranda of time worked or misconception of their rights with respect to accurately kept personal memoranda—little harm and much good accompanies their direct submission to management by the individual employees. They are usually straightened out on the spot, to the mutual satisfaction of everyone concerned. In a way, such claims do not really involve the employees' rights under the collective agreement. They more closely concern his rights created in his personal "contract" of employment, since they do not reflect a misinterpretation of the collective rights so much as they indicate, rather, a misapplication of conceded rights to individual situations through erroneous conceptions of facts.

Now this is a broad statement. But it is intended only to suggest a valid distinction between claims made under clearly understood contract rights with respect to which a misconception of the actual facts exists, on the one hand, and claims made, on the other, under ambiguous or disputed contract rights with respect to which the facts are conceded. It is obvious that the clear categorical distinction between these two situations may easily become lost in particular cases, and occasionally it may seem to be only one of degree. The distinction is suggested only to show that there are certain types of cases easily and adequately cleared up by individual complaints made directly to management. As long as everyone concedes that such adjustments are not in themselves "bargaining," it is hard to see how their occurrence detracts from the function of the union as exclusive bargaining agency. Obviously, if such claims are not promptly and easily settled to the mutual satisfaction of the parties immediately concerned, they become grievances under the collective agreement as a matter of course. And while the union might appropriately have handled them in the first instance, at this stage its intervention becomes imperative.

These conclusions, regarding the power of a union acting as exclusive bargaining representative to dispose of all the details of employment which affect individual employees in a particular unit, have been sub-

jected to serious question in a recent decision of the Supreme Court—*Elgin J. & E. R. Co. v. Burley*[7]—handed down in June, 1945. This case arose under the Railway Labor Act and thus may not drastically affect the administration of collective agreements and union bargaining power in industry in general, because of the peculiar conditions prevailing in the railway labor scene. Nevertheless, it is a most disturbing invasion of the principle of majority rule and may have repercussions endangering the salutary developments of recent years in this direction.

In this case it appeared that certain individuals employed by the Standard Oil Company had operated railroad equipment in that company's yard in Whiting, Indiana. During 1934 the railroad took over these yards and the operators in question became employees of the railroad, as well as members of the appropriate brotherhood with which the railroad had a collective agreement. Four years elapsed thereafter before the railroad finally conceded that these employees should be governed by a certain provision of this agreement dealing with starting time. In the meantime, these individuals, through the union, had filed claims for penalty back pay with the Railway Adjustment Board, contending that the railroad owed them these accrued sums totaling around $65,000, under the terms of the agreement. In 1938 the railroad offered a settlement of these claims to the union, on the understanding that its acceptance would wipe out the claims for good. The officials of the union agreed to this settlement and the claims were formally withdrawn from the Adjustment Board.

Thereafter the individual employees concerned filed new claims for the penalty back pay incurred because of the railroad's noncompliance with the agreement. Naturally, the railroad pleaded the settlement of these claims with the union as a defense to their renewal. The Adjustment Board thought this defense good, so the individuals brought suit in the federal courts. Eventually five members of the Supreme Court held that the settlement by the union was no bar to their suit, while the four dissenting justices thought it should be a bar. Justice Rutledge, speaking for the majority, said that since the individuals had not expressly authorized this settlement, the Court must conclude that the union had no power in itself to settle already established claims for past money due over the heads of individual members of the unit, even conceding that it had the sole and exclusive power to bargain out conditions of employment to operate prospectively.

Justice Frankfurter, speaking for the minority, declared that this was not a simple case of a principal (the individual employees) attacking the

[7] 325 U.S. 711 (1945).

unauthorized act of an agent (the union). He insisted that developments in American unionism have been consistently in the direction of exclusive bargaining power in the unions representing employees. Also he pointed out that employees in the past have been dealt with severely for bargaining directly with individual workers who were represented by unions. He deprecated the distinction between bargaining over future terms of employment and the settlement of past due claims in favor of individuals. Thus he intimated that this decision is a severe setback to the principle of majority rule in American unionism and that, as a consequence of it, employers will be forced to abandon direct dealings with unions and to seek recourse to litigation as the only safe method of procedure in handling union affairs. The Court later consented to a reconsideration of this decision. But in March, 1946, a majority of its members reaffirmed its original position in this case,[1] in spite of the fact that the United States government, several of the railroad unions, the A. F. of L. and the CIO, in general, joined with the railroad company in urging a reversal. The uncertainty resulting from the Court's qualified adherence to its original position in this case has apparently disrupted settled practices under the Railway Labor Act sufficiently to require Congress immediately to pass legislation neutralizing the effect of the *Burley* decision.

Any supposed denial of rights under a collective agreement to individual employees or to whole groups of employees—constituting either a part of the bargaining unit or the entire unit itself—gives rise to a grievance or a series of grievances. Such grievances *must* be clearly distinguished from individual or group demands for additional rights, frequently wage increases, not already established in the existing agreement. The latter type of demand is not, strictly speaking, a grievance at all. It is, rather, a new collective bargaining demand and, while there is no harm in its being made during the life of an agreement, such a demand does not arise under the terms of the agreement. Indeed, its pursuit by self-help bargaining techniques such as the strike may be in direct violation of already established contract provisions.

Now, the prosecution of a true grievance arising under a collective agreement—either on behalf of an individual employee, of a group of employees, or of the entire unit—may accurately be described as a type of bargaining in itself. That is to say, it is bargaining expressly contemplated in the grievance procedure. Such a process is different from *collective* bargaining—which term is used to denote the negotiations leading up to the collective agreement itself. Nevertheless, the process of handling a grievance

[1] Elgin, J. & E. R. Co. v. Burley, 66 Sup. Ct. 721 (1946).

is a kind of bargaining, since it normally looks toward a settlement either by the employer's eventual acknowledgment of its justice, by some compromise, or by some further step such as arbitration when the employer stands pat and the union refuses to admit that it is wrong.

One may well ask by what right a union shall intervene between the employer and the individual employees or groups of employees in order to represent the latter in handling their grievances. Why should an individual employee not be free to settle on any grounds agreeable to him, or to dismiss entirely any grievance he has raised concerning his personal interests? And why should an employer not be free to deal in this way with the individual employee? Why is not a union's collective and representative function fulfilled when it has bargained out an agreement? There may be many answers to these questions. One of them certainly is that this adtional representative function is customarily undertaken by unions, quite often in conformance to express provisions in the grievance procedures outlined in collective agreements. And it is much better that way for practical reasons. Most individual workmen are not able to deal with such matters. They may be skilled craftsmen or they may be common laborers, but whatever they are, they frequently lack the interpretative and forensic abilities to deal with business matters of this sort.

Then again, the whole point of collective representation in the first place was to avoid direct dealings between an employee and his employer because of the inequality in their relative bargaining power. This point might be lost if the employer were permitted to deal with individual employees directly for the purpose of settling grievances which arose under an agreement bargained collectively between him and the union. Furthermore, the union itself, on behalf of all the employees in the unit, has a very real interest in seeing that the terms of the agreement are observed in their practical, day-to-day application. Hence, it can hardly be expected to risk dubious precedents resulting from individual bargaining or to stand by and see what it fought for in the agreement being whittled away by the employer's settlements with relatively helpless individuals.

A very real problem occurs when nonmembers of the union raise grievances under the contract. Although it would be a stupid business practice, some people might suspect that a union would not prosecute such grievances faithfully, concluding that nonmembers should, therefore, be encouraged to settle their complaints with management. And this feeling of suspicion may be heightened where it appears that a favorable settlement of a nonmember's grievance would in some way be disadvantageous to a member of the union. Such a situation might easily arise over conflicting

seniority claims between a member and a nonmember. Again, the answers to this problem may be manifold, but a few adequate answers seem apparent.

An established union in an open shop is anxious to convince nonmembers of its value to them in order to secure their membership. One of the best ways it can do this is by faithfully servicing their grievances. Such an undertaking may be difficult, when success means depriving a union member of some benefit he enjoys through the employer's misapplication of the contract. Any union representative is likely to hesitate before going to bat under such circumstances. Fortunately, however, such cases seldom arise, since the average employer may be trusted not to make many mistaken applications of the contract in favor of union, as against nonunion, employees. But even if he does, it seems fairer in the interests of expediency to allow the union the sole right of handling grievances with the employer, in view of the harm to collective representation which may ensue from any other course. After all, a nonunion employee in such a plight belongs to a group in which the majority has selected the union as their exclusive bargaining representative. Under the principle of majority rule, it seems fair enough to make him accept the imperfections of that system along with its benefits, one of which is the very provision which has given him the right to raise a grievance in the first place. Furthermore, he is free to join the union any time he concludes that his nonmembership is disadvantageous to his interests.

Many unions, certified as exclusive bargaining representatives of all employees in open shops, bitterly resent the ability of nonmembers to enjoy all the benefits of collective bargaining without contributing in any way to the support of the unions who secured these advantages. These nonunion members of the bargaining units accept seniority, vacations, and wage increases, expecting to have all of these advantages secured to them in strict accordance with the terms of the agreements. Yet they did not contribute to the expense of the original bargaining negotiations and paid nothing toward the upkeep of these contracts. As the union men see it, these free riders make nonunionism pay dividends, for they earn just as much as the union members and are able to keep in their pockets what their organized fellow-workers pay out in dues. Of course, the unions realize that if collective bargaining is going to be effective, it must introduce uniform standards throughout a unit, for union and nonunion employees alike.

When a union is unable to secure a closed shop contract in a unit, its members know that the price they must then pay for the advantage of

exclusive bargaining rights in that unit is the overhead cost of this privilege. Unions nevertheless prefer it that way to allowing a cleavage between higher union and lower nonunion standards of employment in the same unit. While this divergence of standards might induce nonunion employees to join the organization, past experience indicates that it might eventually insure the undermining of union standards and, possibly, of the union itself. For the introduction of lower nonunion standards might give the employer an incentive to hire only people willing to work under such standards. Unions have bitterly fought this sort of thing for decades. They found in the past that the closed union shop was the only protection against it. For if all employees belonged to the union, they worked under union standards and the employer could not introduce lower standards to compete with them.

Under the NLRA, however, unions know that their standards cannot be undermined in this way, even in an open shop, now that their collective agreements introduce uniform standards. This is something for which they are thankful. But they and their dues-paying constituents now fail to see why the nonunion employees should not share the cost of achieving these benefits. The way to make them share, of course, is to get the closed union shop and establish union membership in good standing as a condition of continued employment. During the next few years, this element of union discontent is bound to intensify the drive for closed union shop contracts. The inevitable clash might conceivably be settled without conceding the closed shop by checking off from nonunion employees' pay amounts equivalent to union dues and assessments and paying this money over to the unions.[9] Perhaps a less shocking compromise would be for each employer to pay this checked-off money to some charity.

Either way would deprive the nonunion employees of their advantage over union workers and would serve to keep labor standards uniform. But only the former method would keep the unions from pressing for the closed shop and, under the present state of our law, both methods might easily render the employers liable to their nonunion employees for the amounts checked off. Hence, we may expect determined union drives for the closed shop or for legislation permitting employers to check off the equivalent of union dues and assessments from the wages of nonunion employees, to be paid to the bargaining representatives acting for them. And if the unions base this legislative demand on the legal theory of an implied contractual right to compensation for services rendered and a

[9] See decision of Justice I. C. Rand in the arbitration proceedings between the Ford Motor Company of Canada and the UAW-CIO. 17 L.R.R. 813 (1946).

corresponding obligation for services accepted, society cannot afford to laugh this off. They will be deadly serious about it.

In the meantime there will remain the practical difficulties apparent when a union is obliged to prosecute grievances filed under a collective agreement by nonunion employees. But the foregoing discussion may indicate reasons why we should not feel too sorry for these employees. If collective bargaining and collective representation are to become the future basis for industrial democratization, in which the majority rule is to prevail, then society should no more pity these nonunion employees than it does a citizen denied social benefits because he refuses to pay his taxes. People who think unionism is bad for our economy will naturally disagree with this because it would tend to force all nonunion employees into the unions representing them. But in light of what has been happening in the development of labor policy affecting unions, they must concede that a trend of this sort is politically foreseeable.

ARBITRATION—ITS SCOPE AND POSSIBLE LEGISLATIVE BACKGROUND

The state courts afford individual employees no practicable recourse in the pursuit of their rights under collective agreements. Rather than go to the extreme of suing in the courts, most of them would prefer to pocket their losses and wait until justice is less expensively and more conveniently achieved. Yet this is all that our law at present provides. Even this recourse is uncertain and enshrouded with conflicting legalistic theories. And if a union were willing to bring suit on grievances arising under collective agreements, either on behalf of individual employees or for a whole bargaining unit, it is doubtful under existing judicial authority whether it might do so. There are isolated instances of unions securing judicial aid in compelling employers to comply with collective agreements. But there is little reason to believe either that such precedents will be generally followed or that they point the way to a proper solution of this vexing problem.

The fact remains that the courts do not provide either an adequate or appropriate method of applying and enforcing collective agreements. Employers and unions are aware of this. Just as the merchants in the medieval fairs set up their own informal "courts" to adjust their mutual differences on the spot, so a few employers and unions have established their own procedures for settling disputes arising under collective agreements. The "law merchant" was eventually absorbed into our common law after some centuries had elapsed. In time our common law might adapt itself to the practical needs of labor relations and reflect some of the techniques developed by these employers and unions. But society cannot wait for this to

happen, even if it wanted the courts to assume control of applying and enforcing collective agreements. Only the legislatures are able to intiate these settlement procedures for general application throughout industry. And if they are to be uniform, Congress is the only legislature up to the job.

Arbitration affords an expeditious and inexpensive procedure for the settlement of labor grievances. Yet most employers and most union leaders are suspicious about arbitration—at least, until they have tried it. The nature and scope of this process must be carefully defined before their suspicions are allayed. Now, arbitration is an informal procedure for deciding disputed issues. While it *can* be used as a substitute for collective bargaining, in order to break a deadlock in negotiations between employers and unions over the terms of a collective agreement still in the making, its use for this purpose hardly seems to be real arbitration at all. This is the sort of thing the War Labor Board did as a substitute for collective bargaining over the terms of agreements during the war. But nobody thought of the War Labor Board as arbitrating disputes!

Indeed, it is practically impossible to arbitrate deadlocks of this type in the absence of generally conceded standards of decision. Real arbitration would properly seem to imply the disposition of a dispute in accordance with some standard—possibly a law, a trade practice, or a provision in a contract—which the parties to the dispute concede to exist, although they cannot agree upon what it means or how it is to be applied in the particular case. Collective bargaining over the terms of a collective agreement, on the other hand, is not a process involving the application of a standard of any sort to a specific situation. Collective bargaining is, rather, an attempt to establish standards—the standards of employment which are in themselves the subject of dispute.

The only conceivable standards that might govern collective bargaining negotiations are general economic standards, and the consensus around the table on these may be easily imagined! To be sure, arbitrators could establish standards if they had to do so. But it seems absurd to let them draw upon their personal notions of economic values in order to break collective bargaining deadlocks. Indeed, this could hardly be termed the application of external standards, no matter how objective the arbitrators might be. Congress, presumably, could legislate standards through the exercise of its political process. But if it went this far, it would probably not leave their application to private arbitrators. More likely, it would set up an administrative commission under which so-called "arbitrators" would decide particular cases in accordance with these standards, their

"awards" being subject to the commission's approval. At any rate, employers and labor leaders might well remain suspicious about arbitration in view of the current loose usage of that term in connection with resolving collective bargaining disputes. Rather than entrust their affairs to such an ill-defined procedure, they would understandably prefer to fight for what they can get by recourse to traditional collective bargaining techniques. And dressing up this process in the cloak of "fact-finding" provides a poorly disguised substitute, hardly adequate to allay these suspicions.

In a labor relations context, arbitration more accurately implies the interpretation and application of an already achieved collective agreement in the disposition of specific grievances raised under that agreement. There the arbitrator is at liberty to act only within an area that the parties to the agreement had ample opportunity to define in considerable detail. Of course, employers and unions cannot possibly anticipate all possible exigencies and provide for them in their agreements, and what they do cover in advance is frequently couched in ambiguous language. Amazingly different and conflicting interpretations can be read by opposing counsel into apparently clear sentences or phrases used in the agreement to express the mutual intentions of the parties. Sometimes whole sections appear to have been written with such ambiguity that they suggest the studied effort of the parties to remain unclear, each in the possible hope that a decisive meaning will ultimately be supplied in his favor. But the arbitrator has to give meaning to the provisions of the agreement as he finds them, after the parties have had a chance to argue their respective interpretations before him. At least he has something fairly definite to apply to specific fact situations brought before him. And when the terms of the agreement are not as definite as they might be, the parties have only themselves to blame if they do not like the construction which the arbitrator puts on them.

But even this limited scope of arbitration seems too broad for many employers and labor leaders. They still fear the discretion which an arbitrator may exercise over their affairs in accordance with his personal opinions and economic predilections. Nevertheless, a few employers and unions have for some years voluntarily submitted their grievances to arbitration. And during the war many of them have become accustomed to arbitration, after it was included in their agreements by the War Labor Board. As a result, it seems likely that some sort of limited voluntary arbitration will generally prevail in the future as the final step in the prescribed grievance procedures of most collective agreements.

In a system of uniform arbitration lies the only real hope for the smooth

operation of an industrial society governed by the terms of collective agreements. The foregoing discussion certainly indicates the impracticability of direct recourse to the courts for the settlement of disputes arising from these agreements. Such a recourse is expensive and time-consuming at best. In any event, our courts are not geared to handle matters of this nature. Only our legislatures can create the necessary procedures and sanctions behind a successful system of arbitration. If this system is to be uniform, then Congress should assume exclusive jurisdiction and promulgate a consistent procedure, including provisions for the enforcement of awards. That uniformity is essential seems obvious, in view of the present-day organization of industry in far-flung corporate units covering vast areas of the nation. A union and an employer operating under a master agreement covering plants in several states could hardly be expected to conform to as many different procedures in the application of that contract—a likely consequence if projected legislation is left to the various state legislatures.

But a vast program of this kind must be approached with great care, for several aspects of it are bound to make unions and employers very nervous, indeed. Most of this feeling of distrust arises from the fear that arbitration will become compulsory. Too many people immediately jump to the conclusion that this process necessarily means the compulsory settlement of *all* labor disputes—even those involved in collective bargaining—and they shudder at the idea of having to live under agreements ultimately written by arbitrators. These fears will hardly be justified if employers and unions are assured that compulsory arbitration will be confined to the interpretation and application of privately negotiated collective agreements, especially if it appears that they will be left free to choose their own arbitrators.

Legislation introducing arbitration should simply require it as the final step in the grievance procedure of every collective agreement, available for the resolution of all differences between employers and unions which arise under their mutually negotiated collective agreements. Employers and unions already know that there *has* to be some convenient and expeditious method for clearing up not only the routine grievances but also the more fundamental issues so frequently arising under collective agreements. They know that these agreements as a rule exist only from year to year, and that it might take twice the life of any such agreement to secure an interpretation and application in a court, if a decision on the merits could be secured at all. As long as they are assured that the scope of compulsory arbitration is defined as suggested, they will accept it with a good grace.

For any opposition to such limited arbitration would imply that they do not wish to observe their collective agreements but would prefer recourse to primitive trial by combat—a procedure which society may grudgingly tolerate while an agreement is in the making but which it can no longer afford to condone after an agreement is reached.

If employers and unions are first assured that compulsory arbitration will be thus limited in scope, they can then divert their energies to seeing that the proposed statute contains adequate provisions. For instance, they could suggest that arbitration awards should be enforceable only by court orders after a judicial review of the awards. They might publicly explore the purpose and extent of such judicial review—whether it would be on the merits of the arbitrator's award, on the arbitrability of the issue decided, or on the authority of the arbitrator to act as he did under the proposed statute, regardless of how he decided the issue on its merits. For the employers and unions concerned might wish some protection against an arbitrator's assumption of power to pass on matters properly the subjects for collective bargaining or to exercise authority in a manner not consistent with the stipulated procedures. Conceivably, they might try to exclude from arbitration any issue that depends for its disposition on the application of some state or federal law or administrative decision covering the subject matter in issue. And they might debate sanctions against the failure of either employers or unions faithfully to abide by their undertakings in collective agreements to settle all their differences under their mutually accepted grievance procedures, including arbitration.

It would be unfortunate if some of these provisions were actually adopted. Of course, the judicial enforcement of arbitrators' awards is essential, for if the losing party can successfully defy an award, the whole procedure would be jeopardized. On the other hand, it is natural to expect that Congress would not make awards automatically enforceable by court decree without some sort of judicial review. But the whole purpose of arbitration would be defeated if the losing party were permitted to retry his case before a court. If this procedure is to work at all, it must depend on faith in the arbitrator's judgment.

Even if a court should disagree with an arbitrator's award in a particular case, either on his statement of the facts and the issue, his interpretation of the evidence offered, or his construction and application of the contract, that does not mean that the court is right and the arbitrator is wrong. The award should still be enforced if the court finds that the arbitrator has not abused his authority as defined in the proposed statute. And the award should stand even if the court believes that the arbitrator has made a decision on an issue which it believes not to have been arbi-

trable at all under the agreement. After all, an arbitrator should be quite capable of deciding that matter himself. If he is honest and sufficiently clearheaded, he will recognize the nature of such an issue and will not hesitate to deny a decision on its merits. Under the projected statute a court should deny enforcement of an award only if it finds that the arbitrator has clearly abused his power in a capricious and prejudicial fashion or has not faithfully adhered to the procedures stipulated by Congress.

A statutory provision denying an arbitrator the power to decide issues which depend for their settlement on the interpretation and application of state or federal laws or administrative rulings would be most distressing. It is true, some people believe that it is bad practice for an arbitrator to accept jurisdiction over such issues. But if, as frequently happens, the parties voluntarily submit to arbitration an issue requiring the interpretation of some law, it is hard to see what harm can accompany this practice. Under compulsory arbitration it might be reasonable to make such awards unenforceable unless the reviewing court agrees with the arbitrator's view of the law in question. But this is not really necessary in most cases, because the arbitrator cannot by his award foreclose official consideration of such situations.

For instance, if he has before him a grievance based on the alleged discriminatory discharge of an employee and he decides that the discharge was not discriminatory but was for proper cause, nothing he has done can foreclose the NLRB from thereafter concluding otherwise. Similarly, if an arbitrator gave an award to a union on the basis of the Wage and Hour Act, involving rates and back pay of employees who are really under the jurisdiction of the Interstate Commerce Commission and excepted by a ruling of that commission from the terms of the Wage and Hour Act, the employer could secure an official disposition of this case in his favor. The fact remains, however, that many employers and unions prefer to submit these issues to arbitration in order to expedite their settlement. In 99 cases out of 100 they would accept the award, whether or not they agreed with it.

A section in an arbitration statute providing penalties against failures of the parties to abide by those terms of a collective agreement outlining the settlement of disputes which arise under the contract would have to be carefully drawn. Incidentally, this suggests one of the practical problems involved in the enforcement of labor agreements—the fact that it is much easier to compel compliance by an employer than it is to compel compliance by a union. If an employer fails to observe some provision of benefit to an employee or to the union, he can be compelled to make amends by back pay or some other tangible adjustment. But if a union or a group of

employees violates some term of the contract designed to secure advantage to the employer, it is almost impossible to impose a remedy or even to enforce future compliance, except by negative actions such as discharges and disciplinary layoffs. This may be due to the nature of a collective agreement, since it is a document in which are scheduled the terms of employment given by the employer to his workers. In short, the employer is conceding something and the employees are receiving something. What they give in return is, primarily, their labor. Hence, about the only kind of undertaking they can enter into collectively concerns their supplying of services.

Off hand, this suggests the no-strike pledge for the duration of the contract. Such a pledge may, of course, have reference to collective bargaining strikes in pursuit of advantages not already granted in the agreement, or it may have reference only to strikes called to secure a favorable settlement of some grievance or issue arising under the terms of the agreement, for the disposition of which a procedure is set forth in the agreement itself. About the only practicable measures possible against bargaining strikes in violation of a collective agreement are injunctions and actions at law for money damages. Abrogation of the entire contract is frequently spoken of as a possible device to discourage bargaining strikes in violation of a no-strike pledge. But this would be a ridiculous penalty, since nothing would be gained by it except a good deal of grief. In any event, these sanctions could not be administered by an arbitrator, even if they were provided for in controlling legislation.

A union's promise not to strike in order to secure the settlement of grievances and other issues arising under an agreement, however, is an entirely different matter. An arbitrator can fairly easily administer and enforce an undertaking of this type. If a union has called a strike or slowdown in violation of such a promise, the arbitrator can uphold the company in whatever appropriate steps it took to discipline the employees involved, such as layoffs or discharges. Moreover, in subsequent proceedings before him, involving the issue which occasioned the work stoppage, the arbitrator may give the award to the company because of the union's breach of contract, regardless of what he may think of the grievance on its merits. Of course, the arbitrator would impose this penalty only when it was requested by the employer in such a case. Where, on the other hand, an employer "struck" by refusing to take a grievance to arbitration, the arbitrator could be authorized by statute to hear the grievance from the union in the absence of management and to render an award in the union's favor if he took its views on the merits of the case. This would certainly be

a sufficient sanction against an employer, as long as the union was permitted in this way to raise the grievance and secure a decision.

This discussion may seem to indicate that the *only* suitable function of a labor arbitrator is to interpret and apply the terms of collective agreements. But there are other situations where arbitration has been and will continue to be exceedingly useful and appropriate. Suppose that a bargaining strike is settled by a truce which provides that the employer in question will adopt rates equal to those paid for similar work in another plant organized by the same union. Because of variations in figuring rates in the two plants, due to different base rates and incentive plans, the parties are unable to complete their negotiations and agree to submit the effect of their truce to an arbitrator. An issue of this sort is reasonably suited to arbitration, because it involves the interpretation of an interim agreement, although it is a definite part of the collective bargaining process leading up to a final agreement.

Another type of arbitrable situation is the old-fashioned type of jurisdictional dispute. Yet this has nothing to do with the terms of any agreement. To use the classical example, suppose a dispute arises between the carpenters and metal workers on a construction job, concerning which union shall have the work of hanging metal doors. The carpenters claim they have always hung doors, even if they were formerly made of wood, and the metal workers claim that they have always handled metal, whether it was in fixtures, window sashes, or anything else, admitting, however, that they have never before hung doors. Even though there are few standards to guide him in this sort of situation, an arbitrator could adequately dispose of a dispute like this on the basis of testimony and findings concerning the background and history of the two unions concerned, with particular reference to their craft functions. Legislative authority for arbitration of these jurisdictional disputes, with a provision enabling enforcement of awards by injunction, should obviate one of the most wasteful and inexcusable types of strikes.

Aside from situations like these, opportunities for arbitration are rare in the absence of established collective agreements. Of course, if employers and unions *agree* to submit any conceivable issue to "arbitration," using that name to describe the method they choose for breaking a deadlock, they can no doubt get a settlement. After all, an arbitrator can undertake to pass on a requested wage increase with reference to the rise in the cost of living and to alleged reasonable standards of living, if the parties ask him to do it. Perhaps under such circumstances it is not even a misnomer to call this process "arbitration." But it seems wise to keep in mind that this method of settling such an issue is not arbitration as it has become

known through practice in recent years. In any event, it would be a mistake to compel by statute the submission of such cases to so-called arbitration. If the government wants to provide an agency to settle issues of this kind without recourse to strikes, that is another matter. But the process would then more accurately be called compulsory "collective bargaining."

This brief account of arbitration can be justified only to suggest a practical device for interpreting and applying collective agreements. Individuals and groups of employees, or even unions representing them, cannot be expected to take their cases to courts, particularly under the present primitive stage of the common law concerning the enforcement of collective agreements. If a procedure is to be developed by legislation, it should be an adequate one, practically suited to handle specific requirements. Since there is great need for uniformity of procedure—particularly in view of the sectional and nation-wide character of so many corporate employers and affiliated unions—federal legislation equivalent in jurisdictional scope to the NLRA seems imperative.

Such legislation must carefully define the character of issues to be covered by compulsory arbitration. While it should no doubt state certain standard requirements as the basis of this procedure, it must leave employers and unions somewhat free to develop arbitration procedures of their own by mutual consent. It would be rash to suggest that state legislatures should not enact labor arbitration statutes, just as several have adopted state labor relations acts to perform locally the same function carried out nationally under the NLRA. But, in the interests of uniformity, Congress might well provide for federal judicial review of state court judgments enforcing or refusing to enforce arbitration awards in industries over which it has jurisdiction.

These are speculative issues, and they may seem to raise considerations far off the beaten path of the law. But the labor relations situation in this country is becoming increasingly complicated. Actual employer-union relationships in collective agreements are being created too rapidly for our existing legal machinery to accommodate. While the procedural developments which have occurred during the war may not be to everybody's liking, some of them seem much too valuable to lose through Congressional inaction. Everyone directly interested in these matters must face the fact that collective bargaining and collective agreements are here to stay. Everyone should realize that to avoid industrial chaos, a practical and effective procedure must be devised to make collective agreements stable and operative. In any event, now is the time for everyone interested to speculate on these matters, for the mold of our future law of labor relations is about to be cast.

COMMENT

PARADOXES OF THE *ASSOCIATED PRESS* DECISION—A REPLY*

HOWARD ELLIS†

The recent use of the Sherman Act in a successful campaign by the Government to outlaw restrictions on membership in the Associated Press[1] may, as has been suggested by Mr. John Henry Lewin, presage an extension of the scope of both substantive sections[2] of the statute as hitherto understood by antitrust lawyers. However there are certain basic contradictions and inconsistencies in the decision[3] which merit discussion.

This case never went to trial upon the disputed issues of fact. The proceeding was brought before a three-judge district court[4] and judgment was entered on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The decision must therefore be viewed solely in the light of the admitted, agreed, or undisputed facts presented to the district court.

The district court had found in its formal Conclusions of Law that:

> IX. AP does not monopolize or dominate the furnishing of news reports, news pictures or features in the United States.
>
> X. AP does not monopolize or dominate access to the original sources of news.
>
> XI. AP does not monopolize or dominate transmission facilities for the gathering or distribution of news reports, news pictures, or features.

Of course AP did have a monopoly of its own news dispatches, just as The United Press and International News Service have a monopoly of their news dispatches, and just as a manufacturer of shoes has a monopoly of his own particular brand of shoes. But in the proceeding for summary judgment AP was not found to be a monopoly, and could not be found to be a monopoly in the face of disputed issues of fact. It follows therefore

* See Lewin, The Associated Press Decision—An Extension of the Sherman Act?, 13 Univ. Chi. Rev. 247 (1946).

† Member of the Illinois Bar and attorney for the Chicago Tribune and Robert R. McCormick, publisher of the Chicago Tribune, defendants in the antitrust proceedings against the Associated Press and its members.

[1] For brevity the Associated Press is referred to as AP.

[2] 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–2 (1941).

[3] United States v. Associated Press, 326 U.S. 1 (1945).

[4] United States v. Associated Press, 52 F. Supp. 362 (N.Y., 1943).

that the charges made by the government that AP was a monopoly or a near monopoly must have been, and must now be, wholly eliminated from consideration.

Moreover, the district court did not find either that the sections of the AP by-laws which prevented service of AP news dispatches to nonmembers and which prevented AP members from furnishing spontaneous local news to any one not a member of AP, or that the agreement between AP and the Canadian Press under which AP secured exclusive right to receive the news reports of the Canadian Press and its members, were illegal in and of themselves. The district court held that these by-laws and this contract were illegal only when taken in connection with the restrictions on the admission of members into AP. It enjoined the observance of these by-laws and of this contract temporarily, pending AP's obedience to the decree enjoining the restrictions on membership.

Thus the AP restrictions on admission of members were the sole alleged illegality which could possibly have been considered a violation of the Sherman Act. These restrictions meant simply that AP would not accept into membership and serve any publisher in the field[5] of a member save upon certain stipulated conditions. It was admitted that a member already in the field could, by invoking those conditions, make it more difficult for an applicant to acquire admission to AP in that field if such member did not approve of the admission of the applicant. The defendants, in argument, went even further and contended that AP could lawfully enter into unconditional agreements with its members (subscribers to its news services) that it would not under any circumstances furnish its services to any other newspaper in the field of a member without the consent of such member. There, stripped of calculated confusion, is the only real issue in the case: May a press association by contract protect the exclusivity value of its news dispatches?

Mr. Justice Frankfurter and the district court found themselves in a difficult position on this issue. The district court canvassed "settled instances" in which restrictive agreements have been held unlawful, but could not make the AP membership restrictions fit within any of such "settled instances." It proceeded to discuss the particular and unique nature of news reports, developing the so-called "full illumination" theory, outlined thus:

> However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general inter-

[5] The scope of the field of a member is limited not only to the community but to the type of paper published—that is, morning, evening, or Sunday.

ests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment. . . .[6]

Mr. Justice Frankfurter held to this concept boldly and consistently.[7] The short of the theory is that any contractual restraint, although lawful in all other industries, is unlawful in this single industry—the only industry specifically protected by the Constitution against the perils of governmental encroachment. This is the first paradox.

The opinion of the Supreme Court, delivered by Mr. Justice Black, was not thus forthright. The majority apparently did not regard these membership restraints as illegal per se; but, purporting to apply the same principles applicable to goods, wares, and merchandise, held them to be "unreasonable," and hence unlawful. In considering the fact of "reasonableness" the majority seem to have encountered certain difficulties of logic.

The majority opinion states time and time again, without qualification or explanation, that the district court found these restrictive covenants to "constitute restraints of trade," thus conveying the impression that the district court found these covenants to be "unreasonable" and hence violative as in the ordinary case of fungible goods. It is questionable whether the district court actually made any such finding of fact. No such finding was necessary or appropriate to the theory adopted by that court. The majority opinion states several times that the entire case is to be considered in relation to the background of a scheme or plan designed by AP and its members and aimed at "stifling" competition between member and nonmember newspapers. But the district court, after oral argument, did not enter any such finding of fact. The majority opinion, even though passing upon a proceeding for summary judgment, found that the membership restrictions would have the "necessary effect" of restraining trade in violation of the Sherman Act. This the majority assumed to do exclusively on the basis of their (the by-laws') terms and the background of facts which the appellants (AP and members) admitted. Yet the record contained affidavits of numerous publishers denying that the restrictive covenants had ever had such an effect in the past. Furthermore, the majority opinion assumed to find that the restrictive covenants would "necessarily" have an unlawful *future* effect, although unwilling and apparently unable to sustain a finding that they had any unlawful *past* effect. The majority concluded that restrictions not found to have had

[6] United States v. Associated Press, 52 F. Supp. 362, 372 (N.Y., 1943).

[7] United States v. Associated Press, 326 U.S. 1, 28 (1945).

unlawful effects for forty-four years *in the past* must "necessarily" have unlawful effects *in the future*. This is the second paradox.

What then was this inherent illegality which the majority discovered upon consideration of a decree entered upon motion for summary judgment, despite paucity of supporting evidence and hotly disputed issues of fact? Perhaps the following statement furnishes a clue:

> It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members gives many newspapers a competitive advantage over their rivals. Conversely, a newspaper without AP service is more than likely to be at a competitive disadvantage. The District Court stated that it was to secure this advantage over rivals that the By-Laws existed. It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 97% of the total circulation in the United States, have AP news service. And the District Court's unchallenged finding was that "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence.[8]

Did the majority thus announce an entirely new rule of law applicable apparently to all enterprises and all industries; namely that when a business organization becomes large—"a vast intricately reticulated organization, the largest of its kind"—it must thereupon serve all comers or it will be found guilty of violation of the Sherman Act? It would follow that International Harvester Company cannot by agreement assure any dealer that he will be the only dealer served by International Harvester Company in his community; that Mutual Broadcasting Company cannot make a contract with an affiliate agreeing that such affiliate will be the sole outlet for the network in his community; that General Motors cannot arrange to have an exclusive dealer in a community. It would follow that whenever a producer or distributor of any article becomes large—how large is not indicated—such producer or distributor must furnish such article to all persons who desire to become dealers in that article; must accept all such dealers on equal terms; and must serve all such dealers at reasonable rates. It would follow that AP cannot agree to furnish its news dispatches exclusively to its own members unless as a practical matter AP will furnish its news dispatches to all who apply for membership. The majority thus permits AP to serve its own members, provided it serve everyone. This is the third paradox.

The majority opinion forces AP to accept all who apply for membership. If AP enjoys the superiority and "indispensability" attributed to it

[8] Ibid., at 17.

by the government, its membership will be vastly increased. Thus in order to prevent monopoly, as outlawed by the Sherman Act, this decision compels AP to travel the road to monopoly. This is the fourth paradox.

Finally, the majority opinion, in the language of Mr. Justice Roberts, requires AP "to operate under the tutelage of the court."[9] Freedom of the press is thus to be guaranteed by direct and continuing governmental supervision. This is the final paradox.

It is worthy of note that of the eight justices who heard the case only four concurred in the majority opinion of Mr. Justice Black. One of these four, Mr. Justice Douglas, also filed a concurring opinion. In still another opinion, Mr. Justice Frankfurter concurred in the result, apparently for the reasons set forth by the district court. Dissenting opinions were filed by Mr. Justice Roberts and by Mr. Justice Murphy, with the Chief Justice joining in the dissent of Mr. Justice Roberts. In the district court Judge Swan dissented from the opinion of the court, which was written by Judge Learned Hand and concurred in by Judge Augustus N. Hand. The fact that eight justices found it necessary to file five opinions would seem to indicate that the Supreme Court itself could not easily fit the activities of the Associated Press into the pattern of illegal restraints fashioned by former decisions. An examination of the findings of fact, conclusions of law, and opinion of the district court, and an analysis of the five opinions filed in the Supreme Court, discloses abundant reasons for the "travail"[10] of the justices.

It appears that this case must be regarded as a confused, and confusing, attempt to impose upon a single organization in a particular field of endeavor the status of a "quasi-public utility," in disregard of the nature of the proceeding before the district court and in contradiction of established interpretations of the Sherman Act and of common rules of logic. Mr. Justice Roberts in his dissent made a succinct summarization:

> The court's opinion, under the guise of enforcing the Sherman Act, in fact renders AP a public utility subject to the duty to serve all on equal terms. This must be so, despite the disavowal of any such ground of decision. The District Court made this public utility theory the sole basis of decision, because it was unable to find support for a conclusion that AP either intended or attempted to, or in fact did, unreasonably re-

[9] Ibid., at 48.

[10] Mr. Lewin introduces his article thus: "The activities of the Associated Press which were finally condemned can so easily be fitted into the pattern of illegal restraints fashioned by former decisions that the marvel is that they could have escaped with immunity so long and that their dispatch should have involved such travail and contrarity of view by the judges which passed upon them." Lewin, The Associated Press Decision—An Extension of the Sherman Act?, 13 Univ. Chi. L. Rev. 247 (1946).

strain trade or monopolize or attempt to monopolize all or any part of any branch of trade within the decisions of this court interpreting and applying the Sherman Act. Realizing the lack of support for any other, the government urges that the District Court's ground of decision is sound and that this court should adopt it.

Suffice it to say that it is a novel application of the Sherman Act to treat it as legislation converting an organization which neither restrains trade nor monopolizes it, nor holds itself out to serve the public generally, into a public utility because it furnishes a new sort of illumination—literary as contrasted with physical—by pronouncing a fiat that the interest of consumers—the reading public—not that of competing news agencies or newspaper publishers—requires equal service to all newspapers on the part of AP and that a court of equity, in the guise of an injunction, shall write the requisite regulatory statute. This is government by injunction with a vengeance.[11]

[11] United States v. Associated Press, 326 U.S. 1, 34 (1945).

THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 13 JUNE 1946 NUMBER 4

BOARD OF EDITORS

RICHARD F. BABCOCK, *Editor-in-Chief*

JOHN PAUL GOOD JOHN D. LAWYER

GEORGE W. OVERTON

Associates

STUART BERNSTEIN
THADDEUS EUBANKS
ERNEST GREENBERGER
LOUIS LEVIT
MARY ELIZABETH PARMER
DAVID PARSON
PAUL H. REID, JR.
HERBERT E. RUBEN

ROBERT L. JAMES
Business Editor

E. W. PUTTKAMMER
Faculty Adviser

NOTES

ANTI-DISCRIMINATION LEGISLATION AND INTERNATIONAL DECLARATIONS AS EVIDENCE OF PUBLIC POLICY AGAINST RACIAL RESTRICTIVE COVENANTS

The increasing number of statutes outlawing various forms of racial and religious discrimination[1] and the recent international declarations against racial

[1] Fair employment practice acts prohibiting discrimination in private employment and creating enforcement machinery were enacted in 1945 in New York and New Jersey, N.Y. Executive Law (McKinney, 1945 Supp.) art. 12, §§ 125–136; N.J. Rev. Stat. (1945 Supp.) tit. 18, § 18: 25–1 et seq. Within the last nine years numerous states have amended their civil rights laws to enlarge the scope of prohibitions against discrimination in public accommodations: Conn. Gen. Stat. (1941 Supp.) § 800 f.; Ill. Rev. Stat. (1945) c. 38, §§ 125, 128a; Mich. Stat. Ann. (Henderson, 1945 Supp.) § 28. 341; Minn. Stat. (Mason, 1944 Supp.) § 7321; N.J. Rev. Stat. (1945 Supp.) tit. 10, § 10: 1–1 et seq.; N.Y. Civil Rights Law (McKinney, 1945

prejudice[2] suggest a possible method for challenging the legality of racial restrictive covenants. The argument that restrictive covenants should be invalidated because they are hostile to a public policy evidenced by such statutes or declarations was made successfully in a recent Canadian case[3] and was rejected in two recent American decisions.[4] The Ontario court invalidated a covenant which provided "land not to be sold to Jews or persons of objectionable nationality." The court found a public policy against racial discrimination not only in provincial statutes directed against other forms of discrimination but also in the provisions of the Atlantic and United Nations Charters to which Canada was a party.[5] New Jersey and California courts refused to accept a similar argument

---

Supp.) art. 4, § 40; Ohio Code Ann. (Throckmorton, 1940) § 12940; Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 18, § 4653; Wis. Stat. (1943) § 340.75.

In 1945 Illinois created a special division in the Attorney General's Office to enforce the civil rights law, Ill. Rev. Stat. (1945) c. 14, § 9. Since 1941 several states have established commissions to study the problems of racial discrimination and interracial relations: Conn. Gen. Stat. (1943 Supp.) § 470g; Ill. Rev. Stat. (1945) c. 127, § 214; Md. Ann. Code (Flack, 1945 Supp.) art. 49B, §§ 1–3; N.J. Rev. Stat. (1945 Supp.) tit. 18, § 18–25–6.

Illinois has prohibited and penalized discrimination by any public official in the administration of his office or of public property of which he has charge, Ill. Rev. Stat. (1945) c. 38 § 128k. Discrimination in hiring for public positions has been made illegal in Connecticut, Conn. Gen. Stat. (1943 Supp.) § 426g, and New Jersey, N.J. Rev. Stat. (1945 Supp.) tit. 10, § 10–1–1. Massachusetts, Pennsylvania, and Rhode Island have prohibited discrimination in the administration of public assistance, Mass. Ann. Laws (Michie, 1944 Supp.) c. 272 § 98B, Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 62, § 2513; 1944 Rhode Island Acts and Resolves, c. 1505, § 22.

Other recent statutes prohibit discrimination in state-aided housing projects, N.Y. Public Housing Law (McKinney, 1945 Supp.) art. 11, § 223; Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 18A, § 1711; municipal hospitals, N.J. Rev. Stat. (1945 Supp.) tit. 30, § 30: 9–17; air-raid shelters, N.J. Rev. Stat. (1944 Supp.) sub-tit. 122A, § 2: 122A 1 et seq.; labor organizations; N.Y. Civil Rights Law (McKinney, 1945 Supp.) art. 4, § 43; state championship athletic contests, N.Y. Civil Rights Law (McKinney, 1945 Supp.) art. 4, § 43; and in the issuance of insurance policies, Mass. Ann. Laws (Michie, 1944 Supp.) c. 175, § 113E; Minn. Stat. (Mason, 1944 Supp.) §3766–1; N.Y. Insurance Law (McKinney, 1940) art. 9-A, § 209.

[2] See note 12, infra.

[3] In re Drummond Wren, [1945] 4 D.L.R. 674.

[4] Lion's Head Lake v. Bizezensky, 43 A. 2d 729 (Dist. Ct. N.J., 1945); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944).

[5] The statutes and the pertinent provisions thereof cited by the court are as follows: "No person shall—(a) publish or display or cause to be published or displayed or (b) permit to be published or displayed on lands or premises or in a newspaper through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons." 1944 Ont. Stat., c. 51. "Any licensed ensurer which discriminates unfairly between risks within Ontario because of the race or religion of the ensured shall be guilty of an offense." The Insurance Act, Rev. Stat. Ont. (1937) c. 256, § 99. "Every hall erected under this Act shall be available for any public gathering of an educational, fraternal, religious or social nature or for the discussion of any public question and no organization shall be denied the use of the hall for religious, fraternal or political reasons." Regulations, § 6, passed pursuant to Community Halls Act, Rev. Stat. Ont. (1937) c. 284.

The court also held that the covenant was void as a restraint on alienation, and that the

based upon statutes in their respective states. Other arguments against the legality of restrictive covenants have not been successful in this country. The Supreme Court has refused to reconsider *Corrigan v. Buckley*[6] in which the Court held that a racial restrictive covenant did not raise a constitutional question.[7] Allegations that such covenants violate the rule against restraints upon alienation[8] or that they fail to meet technical requirements for enforcement have been ineffective.[9] Pending a reconsideration of the *Corrigan* decision[10] the "public

---

description "Jews or persons of objectionable nationality" was void for uncertainty. However, these rulings were clearly secondary to the holding on the basis of public policy.

[6] 271 U.S. 323 (1925); see note 10, infra.

[7] State courts frequently cite this case as authority for the rule that racial restrictive covenants are not in violation of constitutional guaranties. United Co-operative Realty Co. v. Hawkins, 269 Ky. 563, 108 S.W. 2d 507 (1937); Ridgeway v. Cockburn, 143 Misc. 511, 296 N.Y. Supp. 936 (1937); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Stone v. Jones, 66 Cal. App. 313, 152 P. 2d 19 (1944); Doherty v. Rice, 240 Wis. 389, 3 N.W. 2d 734 (1942). But cf. Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892); see McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

[8] See Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 721, 734–41 (1934); Bowman, The Constitution and Common Law Restraints on Alienation, 8 Boston U. L. Rev. 1 (1928); Bruce, Racial Zoning by Private Contract in the Light of the Constitution and the Rule against Restraints on Alienation, 21 Ill. L. Rev. 704 (1927). Section 406, Comment L, of the Restatement of Property (1944) states: "The avoidance of unpleasant racial and social relations and the stabilization of the value of land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation."

Those courts which hold that covenants prohibiting ownership by members of certain races are invalid restraints upon alienation, invariably nullify such a rule by holding that covenants which bar use and occupancy by members of a prohibited group do not violate the rule against restraints on alienation. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Parmelee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); cf. Edwards v. West Woodridge Theatre Co., 55 F. 2d 524 (App. D.C., 1931).

[9] The technical grounds upon which discriminatory covenants have been resisted with varying success are: (1) the required number of signatures was not obtained to give effect to the covenant according to its terms, or that there was fraud in obtaining or reporting the required number of signatures, compare Burke v. Kleiman, 277 Ill. App. 519 (1934), with Hansberry v. Lee, 311 U.S. 32 (1940), reversing 372 Ill. 369, 24 N.E. 2d 37 (1939); cf. Foster v. Stewart, 134 Cal. App. 482, 25 P. 2d 497 (1933); (2) failure to record, see Meade v. Dennistone, 173 Md. 295, 196 Atl. 330, 336 (1938); (3) change in character of occupancy in neighborhood subsequent to covenant, Grady v. Garland, 89 F. 2d 817 (App. D.C., 1937); Mays v. Burgess, 152 F. 2d 123, 124 (App. D.C., 1945); Pickel v. McCawley, 329 Mo. 166, 44 S.W. 2d 857 (1931); Letteau v. Ellis, 122 Cal. App. 584, 10 P. 2d 496 (1932); see 7 Univ. Chi. L. Rev. 710 (1940); (4) restrictions were not uniformly imposed on land in the immediate neighborhood, see Oberwise v. Poulos, 124 Cal. App. 247, 250, 12 P. 2d 156, 157 (1932); (5) occupancy or use by members of the prohibited group was in connection with governmental use of the land, compare Gableman v. Dep't. of Conservation, 309 Mich. 415, 15 N.W. 2d 689 (1944) with Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496 (1930); (6) covenant repugnant to grant of fee-simple estate, White v. White, 108 W.Va. 135, 150 S.E. 531 (1929).

[10] The Supreme Court has denied certiorari in all restrictive covenant cases brought before it since the Corrigan case. Cornish v. O'Donoghue, 30 F. 2d 983 (App. D.C., 1929), cert. de-

policy" argument appears to represent the one device available to opponents of restrictive covenants. Its endorsement by the Ontario court and its use in litigation in New Jersey and California suggest that attempts will be made to impress other state courts with the validity of the Canadian court's reasoning.[11]

The United Nations Charter has been ratified as a treaty and is the law of the land. The United States is also pledged to support the declarations contained in the resolution against discrimination accompanying the Act of Chapultepec. Both these documents contain unequivocal pledges to promote a policy against racial and religious discrimination.[12] However, an American

---

nied 279 U.S. 871 (1929); Russell v. Wallace, 30 F. 2d 981 (App. D.C., 1929), cert. denied 279 U.S. 871 (1929); Grady v. Garland, 89 F. 2d 817 (App. D.C., 1937), cert. denied 302 U.S. 694 (1937); Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), cert. denied 325 U.S. 868 (1945). Two justices were of the opinion that certiorari should be granted and two justices took no part in the consideration or decision of this application. The fact that these cases all arose in the District of Columbia may account in part for the Court's refusal to grant certiorari. It is doubtful if a decision in a District of Columbia case would settle constitutional issues any more than did the Corrigan case, which also arose there. In the case of Harmon v. Tyler, 273 U.S. 668 (1926), the Court reversed a Louisiana case which had upheld the segregation of colored people by means of powers of sale in land instruments, and in Hansberry v. Lee, 311 U.S. 32 (1940), the Court granted certiorari and reversed without remand when it might have dismissed the application under the rule that ordinary res adjudicata is a matter of local law for the state courts to determine. At least one state court assumed that the constitutional issue on restrictive covenants is an open one and decided that such covenants are unconstitutional. In Anderson v. Auseth, Los Angeles Superior Court No. 48408 (unreported, decided December 6, 1945) the court stated: "This court is of the opinion that it is time that members of the Negro race are accorded without reservations and evasions, the full rights guaranteed them under the 14th Amendment of the Federal Constitution. Judges have been avoiding the real issue for too long. Certainly there was no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the war just ended. The objections of the defendants to the introduction of testimony will be sustained." Sustaining the objection to the introduction of evidence was equivalent to a general demurrer to the complaint which sought to enforce a restrictive covenant.

[11] See Jones, Legality of Racial Restrictive Housing Covenants, 4 Nat'l Bar J. 14 (1946).

[12] The following language occurs no less than five times in the United States Charter: "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The preamble of the Charter affirms the faith of the peoples of the United Nations in fundamental human rights, in the dignity and worth of the human person, and equal rights of the sexes. See text of the Charter, 13 Department of State Bulletin 119 (June 24, 1945), also published in Department of State Publication 2353 (1945). The resolution against discrimination accompanying the Act of Chapultepec was proposed by the Republic of Haiti; a similar resolution against discrimination on the basis of sex was proposed by Mexico. Both resolutions were unanimously adopted by the Conference. N.Y. Times, p. 5, col. 6 (March 7, 1945).

The official American position on the discrimination and human rights provisions of the United Nations Charter was summed up by former Secretary of State Edward R. Stettinius, Jr., as follows: "The United States Government will work actively and tirelessly, both for its own people, and for peoples generally, toward the protection and promotion of these rights and freedoms," 13 Department of State Bulletin 928 (May 20, 1945). While no official steps have been taken by the American Government to adjust internal conditions to accord with Charter provisions against discrimination, the Preparatory Commission of the United Nations at London recommended an international bill of rights, and further international conventions or declarations for the prevention of discrimination on grounds of race, sex, language

court which sought to employ these commitments in a restrictive covenant case would be faced with difficulties. Constitutional limitations have been interpreted as preventing the use of the treaty-making power or the powers of the President in foreign relations to effect internal changes which have no substantial relationship to international affairs.[13] It is accepted as inherent in the federal system that the rules governing the transfer of land are to be determined by the states.[14] Thus, international declarations against discrimination cannot be expected to do more than complement an existing state policy against enforcement of restrictive covenants. So long as the *Corrigan* decision is the law, the major factor in the disposition of restrictive covenants will undoubtedly remain the policy considerations of the various states.

In other fields of the law state courts have not been unwilling to infer a public policy from related statutory or general constitutional materials in cases where there are no statutes directly in point.[15] Most of the classic examples of this technique appear in the field of contracts.[16] Married women's property acts have been invoked to support decisions affecting property and personal rights not provided for by the legislature.[17] A similar use has been made of bastardy stat-

---

or religion and the protection of minorities. See McDiarmid, The Charter and the Promotion of Human Rights, 14 Department of State Bulletin 210, 212, 222 (Feb. 10, 1946).

[13] Roca v. Thompson, 232 U.S. 318 (1914); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Compagnie Française v. State Board of Health, 186 U.S. 380 (1902); Heim v. McCall, 239 U.S. 175 (1915); see Missouri v. Holland, 252 U.S. 416, 432–35 (1919); Proceedings, Am. Society of Int'l Law, 194–96 (1929); 2 Hyde, International Law 1397 (2d rev. ed., 1945); James Parker Hall, State Interference with the Enforcement of Treaties, 7 Proceedings, Academy of Political Science 548 (1917); ibid., Discussion by Henry St. George Tucker 582–85. Cf. Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892) where a covenant prohibiting occupancy by Chinese was held not only unconstitutional but in violation of a treaty between the United States and China and therefore unenforceable. The Gandolfo case, perhaps the earliest restrictive covenant case, was not mentioned by the court in the Corrigan case, and has been generally overlooked in restrictive covenant cases although often mentioned by commentators. It has been contended that race discrimination in any form can no longer be considered the purely internal concern of the country in which it occurs. McDiarmid, op. cit. supra, note 10, at 222. Information Bulletin of the Embassy of the U.S.S.R., p. 6 (Nov. 28, 1944); ibid., pp. 4, 5 (Dec. 2, 1944).

[14] Green v. Neal, 6 Pet. (U.S.) 291 (1832); Case v. Kelly, 133 U.S. 21, 23 (1890); Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56 (1921); see Swift v. Tyson, 16 Pet. (U.S.) 1, 18 (1842).

[15] See Landis, Statutes and the Sources of Law, Harvard Legal Essays 213 (1934).

[16] See 5 Williston, Contracts § 1628 (rev. ed., 1937); Winfield, Public Policy in the English Common Law, 42 Harv. L. Rev. 76 (1928); Gellhorn, Contracts and Public Policy, 35 Col. L. Rev. 678 (1935); Pollock, Contracts 350 (10th ed., 1936).

[17] Aaby v. Citizens National Bank, 197 Wis. 56, 221 N.W. 417 (1928) (holding that married women's acts have destroyed the estate of tenancies by the entirety, because the former incapacity of the wife to hold by moieties was removed by the legislation); Donegan v. Donegan, 103 Ala. 488, 15 So. 823 (1894). Contra, Morrill v. Morrill, 138 Mich. 112, 101 N.W. 209 (1904). See 1 Schouler, Marriage, Divorce, Separation and Domestic Relationships §§ 82, 130–31 (6th ed., 1921). For collection of cases utilizing the acts as a basis of changes in the common-law rules as to torts between spouses see McCurdy, Torts between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930); cf. Dalton v. People 68 Colo. 44, 189 Pac. 37

utes,[18] wrongful death statutes,[19] uniform commercial acts,[20] and fair trade legislation.[21] In the absence of any legislation, the invasion of the right of privacy has been held to be actionable because of a provision in the state constitution guaranteeing to every person the right to the pursuit of happiness.[22]

Thus the inference of a public policy from legislation only indirectly related to the issue in dispute is a well known technique in American jurisdictions. Previous to the New Jersey and California cases, however, there were only a few cases in which this technique was suggested as a method for resolving disputes over racial restrictive covenants. In 1914 the Supreme Court of North Carolina invalidated, solely on the ground of public policy, a municipal ordinance which made it unlawful for Negroes to reside on a street where the majority of houses were occupied by whites, or for whites to reside where Negroes were in a majority.[23] The court held the ordinance contrary to the policy of the state, which it inferred from a statute enacted a few years previously when "labor agents began carrying out of the state colored laborers on whom many farmers depended for the cultivation of their crops which alone maintained the value of their lands." The statute made it an indictable offense to act as a labor agent without first obtaining a license. The court said that the policy reflected in the statute was to encourage the continued residence of Negroes, whereas the ordinance, if enforced, might tend to drive some of them out of the state.[24] In *Corrigan v. Buckley*,[25] the Court of Appeals of the District of

---

(1920) which swept away the common-law rule that a husband and wife could not be convicted of conspiracy, on the basis of the economic separation of the spouses provided for in the Married Women's Property Act.

[18] Landis, op. cit. supra, note 15, at 224.

[19] In Hadley v. City of Tallahassee, 68 Fla. 436, 65 So. 545 (1914) the court permitted an illegitimate offspring to recover as "child" under provision of wrongful-death statute; Marshall v. Wabash R. Co., 120 Mo. 275, 25 S.W. 179 (1894); Thompson v. Delaware, L. & W. R. Co., 41 Pa. Super. Ct. 617 (1910); cf. Bell v. Terry & Trench Co., 177 App. Div. 123, 163, N.Y. Supp. 733 (1917). Contra: Robinson v. Ga. R. & Banking Co., 117 Ga. 168, 43 S.E. 452 (1902); State v. Hagerstown & Frederick R. Co., 139 Md. 78, 114 Atl. 729 (1921).

[20] Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925) where the court held that the Uniform Sales Act recognized conditional-sales contracts and thus permitted the court to depart from its earlier decisions to hold in accordance with the majority of courts on a point with respect to conditional-sales contracts not expressly covered in the Uniform Sales Act; Howard National Bank v. Wilson, 96 Vt. 438, 120 Atl. 889 (1923) (Uniform Bills of Lading and Warehouse Receipts Acts employed as illustrating a policy applicable to a neogtiable-instrument case not expressly covered by the Negotiable Instruments Law).

[21] See 43 Harv. L. Rev. 945 (1930).

[22] Melvin v. Reid, 297 Pac. 91 (Cal. App., 1931); cf. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909).

[23] State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914).

[24] This case soon became obsolete due to the decision in Buchanan v. Warley, 245 U.S. 60 (1917), holding racial zoning by municipalities unconstitutional under the Fourteenth Amendment; see Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E. 2d 867 (1940).

[25] 299 Fed. 899 (App., D.C., 1924).

Columbia found in statutes and judicial opinions a policy supporting restrictive covenants.[26]

One obvious reason for the failure to make general use of this approach to restrictive covenants lies in the complete lack of any public policy against racial discrimination in many states.[27] Undoubtedly, a further explanation for the hesitation to use the policy argument has been the general misconception concerning the Supreme Court's decision in the *Corrigan* case. The Court dismissed the appeal from the appellate court's decision on the ground that a covenant against Negro ownership in a District of Columbia neighborhood did not present constitutional or statutory questions sufficiently substantial to give it jurisdiction under the provisions of the Judicial Code. The Court carefully pointed out that it was not passing on the arguments that the covenant violated public policy and was of such a discriminatory character that a court of equity would not enforce it.[28] Nevertheless, subsequent cases have cited the *Corrigan* decision for the rule that such covenants are legally valid and enforceable in equity.[29] Frequently the courts have added that the covenant did not violate public policy without discussion of the point.[30]

Where legislation directed against other forms of discrimination does exist it is still questionable whether the technique employed by the Ontario court and accepted by American courts in other litigation should be employed. In *Lion's Head Lake v. Bizezensky*[31] the New Jersey court, in refusing to hold a restrictive covenant void as contrary to public policy, observed that the legislature had declared the public policy of the state against discriminatory practices in respect to many and varied subjects, among them jury service, hospitals, fair

[26] The court relied mainly upon state statutes providing for segregation of Negroes in common carriers and schools and the decisions which supported these statutes, particularly Plessy v. Ferguson, 163 U.S. 537 (1896), and Berea College v. Kentucky 211 U.S. 45 (1908). It is arguable that it is generally more difficult to infer a public policy hostile to a contract than it is to find a policy supporting a particular contract.

[27] Compare the following statutes with those cited in note 1, supra: 1943 Texas L. p. 651–52 (separate accommodations on motor buses); 1943 Texas L. p. 1119 (equal privileges to all persons of the Caucasian race); 1943 Ark. L. p. 235 (requiring designation of race in divorce complaints, etc.); 1939 Ark. L. p. 170 (poll-tax lists to show color of person paying); 1937 Ark. L. p. 826–27 (separation of races at horse racing tracks); 1944 Miss. L. p. 565 (segregation of races at state penitentiary); 1937 S.C.L. p. 154–55 (segregation of races in trains and steam ferries); 1939 N.C. Pub. L. p. 165–66 c. 147 (separate accommodations on street cars and buses).

[28] Corrigan v. Buckley, 271 U.S. 323, 332 (1926).

[29] Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555 (1942), Porter v. Johnson, 232 Mo. App. 1150, 115 S.W. 2d 529 (1938); Steward v. Cronan, 105 Colo. 393, 98 P. 2d 999 (1940); see also cases cited note 30, infra.

[30] See Helmsley v. Sage, 194 Okla. 669, 154 P. 2d 577 (1944); Parmalee v. Morris, 218 Mich. 625, 628, 188 N.W. 330, 331 (1928); Ridgeway v. Cockburn, 163 Misc. 511, 513, 296 N.Y. Supp. 936, 941 (1937); Chandler v. Ziegler, 98 Colo. 1, 5, 291 Pac. 822, 824 (1930); Koehler v. Rowland, 275 Mo. 573, 585, 205 S.W. 217, 220 (1918); Meade v. Dennistone, 173 Md. 295, 309, 196 Atl. 330, 336 (1938).

[31] 43 A. 2d 729 (Dist. Ct. N.J., 1945).

employment practices, schools and employment in defense industries. The legislature had not, however, "yet declared that restrictions governing ownership and occupancy of private property should be forbidden or eliminated. Until the legislature, the supreme law-making power, acts in the matter it is not within the power or competency of the courts to do so."[32] In *Burkhardt v. Lofton*,[33] the California court refused to find a public policy hostile to racial restrictive covenants in the California Civil Rights Code. The court said:

> The responsibility of striking down the validity of racial restrictive covenants with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the "present" public policy on the subject or of personal belief that the consequences would be for the general good.

The reasoning of the New Jersey and California courts appears sound. If related statutes are said to reflect a policy opposed to restrictive covenants, it is difficult to understand why the legislature did not enact a statute expressly outlawing such covenants. Where a bill designed to invalidate restrictive covenants is introduced but is not passed by the legislature it becomes even more difficult to support the inference of a policy hostile to restrictive covenants from related statutes.[34] There are, moreover, important differences between restrictive covenant cases and other types of litigation in which this technique has been used, which would justify even the most liberal court in refusing to invoke "public policy." In many of the "public policy" cases a decision will affect only the immediate parties to the suit; a later legislative enactment can correct what is believed to be an erroneous opinion of the court. The use of this technique in restrictive covenant cases, however, might have consequences which could not be readily altered by subsequent legislative action. If a court invalidates a restrictive covenant, it is possible that the neighborhood affected will be unalterably and completely changed before any action would be taken by the legislature.[35]

[32] The court neglected to construe the following provision of the New Jersey law against discrimination (Fair Employment Practice Act): "Finding and Declaration by Legislature. The legislature finds and declares the practices of discrimination against any of its inhabitants because of race, creed, color, national origin or ancestry are a matter of concern to the government of the state, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the state but menaces the institutions and foundations of a free democratic state." Since the statute also contained a specific declaration that the opportunity to obtain employment without discrimination is a civil right, the broad terms of the quoted declaration suggest that it was intended to serve as a statement of public policy of general application. N.J. Rev. Stat. (1945 Supp.) tit. 18 §§ 18: 25–3, 18: 25–4.

[33] 63 Cal. App. 2d 230, 146 P. 2d 720 (1944).

[34] See Kahen, Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem, 12 Univ. Chi. L. Rev. 198, 210 (1945) citing H. B. 563, 63d Gen. Assembly of Illinois (1943), 2d S.B. 281, 62d Gen. Assembly of Illinois (1941) which were tabled, as were similar bills submitted to the 61st and 62d General Assembly.

[35] It is generally conceded that when the first breach is made into the restricted area by a member of the group barred by the covenant, an almost complete change-over of the neighborhood soon follows. Thus, while an injunction was being prosecuted to force a family of Negroes

The most persuasive argument against the use of related statutory materials in the covenant case rests upon the extremely controversial nature of these covenants. It is questionable whether it is the proper function of the courts to establish new rules with respect to rights in land which have serious political and economic aspects and upon which the legislature has refused to act. The controversy that has surrounded the advocacy of fair employment practice legislation suggests that equally drastic measures with respect to property interests should be taken only by the legislature. The courts do not provide the best forum for the hearing of the numerous issues which are involved in a debate over racial restrictive covenants.[36]

The attempt to infer public policy from related statutes raises problems similar to those posed by the suggestion that courts exercising equity powers should look to relevant sociological and background materials in many restrictive covenant cases as a source of public policy.[37] It is argued that the desirability of enforcing the covenant should be examined in the light of data pertaining to hardship, population pressures, relative housing facilities, and racial tensions. This proposal would be ineffective strategy against these covenants in many situations since it does not afford relief against a covenant solely because there is discrimination. Furthermore, it is debatable whether a court is equipped to make the necessary investigation.[38] Two recent California decisions in restrictive covenant cases reflect opposite views on the competence of courts to make such investigations in a private litigation.[39]

---

to remove from an otherwise 100 per cent white neighborhood in Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), other Negroes moved into the area in sufficient numbers to indicate that the trend was definitely colored, and still other Negroes had purchased within the area preparatory to occupancy, Mays v. Burgess, 152 F. 2d 123 (App. D.C., 1945).

[36] It is, of course, doubtful whether efforts to have legislatures invalidate restrictive covenants will be successful in any state in the immediate future. However, it does not follow from this that a court is the proper forum in which to try these issues.

[37] The material which presents a sociological approach to the problem of racial restrictive covenants is voluminous. See Kahen, op. cit. supra, note 34, at 198; Race Relations in the Nation's Capital, First Annual Report of Citizens Committee on Race Relations (Aug. 26, 1944); Klutznick, Public Housing Charts Its Course, Survey Graphic (Jan., 1945); Weaver, Racial Restrictive Housing Covenants, 30 J. of Land and Public Utility Economics 183, 190 (1944); Woofter, Negro Problem in Cities (1928); Federal Housing Administration, The Structure and Growth of Residential Neighborhoods in American Cities (1939).

[38] See Gellhorn, op. cit supra, note 16, at 685.

[39] Fairchild v. Raines, 24 Cal. 2d 818, 151 P. 2d 260, 267 (1944), where the concurring opinion of Traynor, J., refers to such social data as pertinent evidence in a restrictive covenant case and states that a trial court should be obliged to determine whether there was a need for Negro expansion into the restricted area as a result of a shortage of available housing facilities in the present colored district. But see Stone v. Jones, 66 Cal. App. 2d 264, 152 P. 2d. 19, 22 (1944), where the court said "Changes, or the likelihood thereof, incident to the growth of a community, may create or forecast perplexing social problems, but such problems, from the very nature of things, cannot be solved by the courts in the process of litigation of a purely private nature." The court, therefore, declined to make such an examination on the ground that it was a legislative task.

In Mays v. Burgess, 147 F. 2d 869, 874, 876 (App. D.C., 1945), Edgerton, J., dissenting,

One may expect to see an increasing use of the public policy argument in restrictive covenant cases in those states which have recently enacted legislation against other forms of racial discrimination. While the technique employed by the Ontario court does not appear to be readily adaptable to the American legal system, the decision does constitute an invitation to those state courts which are unsympathetic to restrictive covenants to limit the influence of the *Corrigan* decision.

LEGALITY OF WAGE READJUSTMENT PLANS UNDER THE OVERTIME PROVISION OF THE FAIR LABOR STANDARDS ACT

The most troublesome question which the Fair Labor Standards Act of 1938[1] has presented to the courts has been the interpretation of that part of Section 7(a) of the Act which provides that the employee shall be paid for overtime work at not less than one and one-half times "the regular rate at which he is employed."[2] In attempting to comply with this provision of the Act the employer is confronted with several problems. In the first place he wishes to maintain his wages and hours at their former over-all level, so that his labor costs will not be increased by compliance. In the second place he wishes to avoid the necessity for spreading work brought about by extra labor cost for extra hours, since it may be uneconomical for him to reallocate the work in his plant for an increased force of workers, all of whom work only regular time; likewise labor unions whose members would suffer from reduced take-home pay by such a result might find it to their interest to support plans designed to avoid it.[3] And in the

---

took the position that the court should consider evidence of the notorious dearth of housing for Negroes in the District of Columbia in making its decision whether to enforce a restrictive covenant. The same judge took a similar position in his dissent in Mays v. Burgess, 152 F. 2d 123, 126, 127 (App. D.C., 1946).

[1] 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201–219 (1942).

[2] The full text of Section 7(a) is as follows: No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[3] The Act was designed primarily for the relief of unorganized, unskilled, and unemployed workers. Presidential messages, 1941 Wage & Hour Man. 747 (1937), and 82 Cong. Rec. 11 (1937). Its passage met with opposition from some labor unions, particularly the American Federation of Labor, which in 1937 went on record opposing it. N.Y. Times, p. 1, col. 2 (May 24, 1937), because it feared that the minimum wage would tend to become the maximum wage. It was estimated by the Department of Labor that by 1945 upwards of 1,000,000 workers would receive wage increases because of the law, but 4,000,000 would have their hours

third place both employer and employee may find it desirable to stabilize weekly wages, a result which the Act's emphasis on the hourly wage may tend to hinder. The numerous plans produced by various employers in attempts to solve one or another of these problems and still comply with the Act have forced the courts to search for a definition of "regular rate" and to reconsider the aims of the Act.

Ordinarily the legality of the scheme will depend on whether the new hourly rate used in computing overtime payments is considered the "regular rate" as required by the Act, or merely an arbitrary or fictitious figure. Thus, where before the Act an employer paid a fixed weekly wage of $40 for variable hours and, to meet the requirements of the Act, commutes the salary into a $1 an hour wage but provides that, should an employee work more than 40 hours a week, the statutory maximum, his hourly rate would be reduced in such a way that the regular plus overtime rate would still average $1 per hour, it is obvious that Section 7(a) has not been satisfied because the reduced rate which would be used in computing the overtime wage was not the "regular rate," but an entirely fictitious figure. The arrangement is in effect a contract to pay straight time regardless of the number of hours worked.[4] While the scheme in the foregoing case is quite transparent, courts have been presented with plans which, though aiming at the same result, have been far more ingenious and plausible, and which have therefore presented a difficult problem of interpretation.

On June 8, 1942, the Supreme Court of the United States handed down two decisions on this question, *Overnight Motor Transportation Co. v. Missel*,[5] and *Walling v. A. H. Belo Corp.*[6] Their joining on the Supreme Court calendar suggests that the Court intended to give a comprehensive clarification of a somewhat muddled situation. The continued, if not increased, amount of litigation since these two cases indicates how unsuccessful this attempt has been.

This unfortunate result has followed from the ever more apparent inconsistency of the two cases which was quite evident to the four dissenting justices in the *Belo* case. In the *Missel* case the employer paid a fixed salary for fluctuating hours in excess of the statutory maximum. There was no fixed hourly rate, but the salary was large enough to cover both regular and overtime work at the statutory minimum hourly rate.[7] This plan, the court held, was unsatisfactory

---

of work reduced. In practice, therefore, this provision of the Act was expected to be a work-sharing rather than a wage-raising measure. N.Y. Times, § 1, p. 12, col. 3 (Aug. 14, 1938). The actual consequences of the Act in this connection are difficult to analyze, since the supervening defense and war programs created an abnormal condition in the labor market.

[4] Cf. Walling v. Green Head Bit & Supply Co., 138 F. 2d 453 (C.C.A. 10th, 1943).

[5] 316 U.S. 572 (1942).

[6] 316 U.S. 624 (1942).

[7] The employee worked, on the average, 65 hours and received $27.50. At this time the legal minimum for the first 42 hours was $.30. His regular pay at the minimum would therefore have been $12.60; his overtime pay for 23 hours at $.45, $10.35. His total compensation at the minimum rate, $22.95, would therefore have been less than what he actually received.

because the "regular rate" was not, as was assumed in the plan, the statutory minimum rate, but rather the average hourly rate, or the quotient of the total wage divided by the hours worked, and overtime payment was one and one-half times the regular rate for hours employed beyond the statutory maximum.[8] This construction of Section 7(a), the Court felt, was necessary to give effect to the aim of the Act which, it said, was not only to raise substandard wages, but also, by requiring extra pay for overtime regardless of how high the regular rate is, to induce the employer to spread employment.[9]

In the *Belo* case the employer, to meet the requirements of the Act, had converted a fixed weekly salary for variable hours into an hourly wage. To keep the weekly pay stabilized at the then current figure, he entered into contracts with his employees individually which in each case specified a basic hourly rate for the legal maximum regular hours and not less than one and one-half times that rate per hour for overtime, with a guaranty of a weekly minimum pay approximating the old salary. Under this plan the employee worked about ten hours more than the statutory maximum regular hours before he became entitled to any pay in addition to his weekly guaranty, and when he did he received surplus compensation at one and one-half times the basic hourly contract rate.[10] The basic rate was in all cases in excess of the legal minimum. The Court, in a five-to-four decision, upheld this formula because the basic contract rate was the "regular rate" within the meaning of Section 7(a) and there was nothing in the Act which prohibited the payment of more for overtime than one and one-half times the basic rate, as was often the effect of the guaranteed weekly minimum. The *Missel* case was distinguished on the ground that in that case there was no stated hourly wage and no provision for overtime.[11]

Although it is easy to point to some distinguishing facts between the two cases, the basic theories and even the broad dicta in the two cases are difficult to reconcile. In the *Missel* case the Court defines "regular rate" as the quotient of the weekly wage divided by the number of hours worked,[12] which rate is then used in computing the overtime pay, while in the *Belo* case a contract rate which does not correspond to the quotient is acceptable. Thus the plan in the *Missel* case could easily be legalized under the *Belo* decision by setting up a more or

[8] Thus if the workweek is 65 hours the average hourly rate in this case is $.423 ($27.50÷65). Since the worker is entitled to an additional 50 per cent of the regular rate for the 23 hours of overtime, he must be paid an additional $4.86 ($.2115×23). His total pay will therefore be $32.36.

[9] This conclusion is borne out by the legislative history of the Act. H.R. Rep. No. 1452, 75th Cong., 1st Sess. (1937). In the debates in Congress over the Act this object of spreading employment was emphasized by Senators Barkley and Healy. 81 Cong. Rec. 7941, 7848 (1938). See the Federal Wages and Hours Act, 52 Harv. L. Rev. 646, 665, 677 (1939).

[10] A typical contract provided that the regular rate would be $.67 for the first 44 hours, the then statutory maximum for regular hours, and one and one-half times this, or $1, for overtime hours. The weekly guaranty was $40. To earn more than the guaranty the employee in this particular example had to work more than 54½ hours, and when he did he received $1 per hour.

[11] 316 U.S. 624, 634 (1942).

[12] 316 U.S. 572, 580 n. 16 (1942).

less arbitrary hourly rate without changing any condition of employment. Therefore, as Mr. Justice Reed points out in his dissent, if the congressional intent behind Section 7(a) was, as was reasonably assumed in the *Missel* case, to spread employment, it was frustrated in the *Belo* case.[13]

Ever since the district court's decision of the *Belo* case it has been the mainstay of employers in frequent litigations with employees or with the Wage and Hour Administrator. The Supreme Court decision in the case came at a very opportune time for many employers. Shortly before, in *Carleton Screw Products Co. v. Fleming*,[14] the Circuit Court of Appeals for the Eighth Circuit had indicated that bonuses were subject to overtime payments under Section 7(a). The Administrator had from the very first urged that the Act applied to piecework earnings, as was later held by the Supreme Court in *United States v. Rosenwasser*.[15] With the *Missel* case eliminating the fixed above-minimum wage plan, a new and legal, but not uneconomical, readjustment plan was needed. Under the *Belo* holding a workweek longer than the legal maximum can be retained without an increase in pay. This is done by fixing by agreement a "regular rate" at or above the legal minimum, yet low enough to produce, if multiplied by the hours worked, a figure smaller than the old weekly wage. The old wage can then be paid in the form of a minimum or by adding bonuses. Since 1942 a large portion of the litigation concerning the Fair Labor Standards Act has involved plans aiming at a similar result and their scrutiny by the courts to determine whether the contract rate set was "regular" or fictitious.

Although in the *Belo* case the Court apparently based its decision on the presence of an agreed-upon regular rate, it was not prevented from holding two years later in *Walling v. Helmerich & Payne, Inc.*[16] that the agreed-upon rates in the so-called "split-day" plan were fictitious. Under the split-day plan a long workday of ten hours, for example, is divided into two shifts. The first five hours are assigned a specified hourly rate above the legal minimum, which is the "regular rate"; the remaining five hours are treated as overtime and their rate is one and one-half times the "regular rate." The regular and overtime rates are so calculated as to insure that the total wages for each workday would continue the same as before the Act.[17] At first glance the plan appears generous, in that

[13] 316 U.S. 624, 635 (1942). The inconsistency of the two cases is even more apparent from the lower court's opinion in the Belo case, in which it was stated that the purpose of the overtime provisions of the Act was not to discourage or limit overtime, but to raise substandard wages. Fleming v. A. H. Belo Corp., 121 F. 2d 207, 215 (C.C.A. 5th, 1941). This interpretation of Section 7(a) is clearly contrary to that in the Missel case. See Overtime Compensation Under the Fair Labor Standards Act for Workers with a Fluctuating Number of Hours per Week, 52 Yale L. J. 159 (1942).

[14] 126 F. 2d 537 (C.C.A. 8th, 1942).

[15] 323 U.S. 360 (1944).

[16] 323 U.S. 37 (1944).

[17] If a worker's daily wage was $5 before the Act, his regular rate would be set at $.40 per hour. Under the split-day plan he would receive $2 for the regular shift of the first five hours and time and one-half or $3 for the second or overtime shift of the remaining five hours. His daily wage of $5 would thus be retained.

time and a half is paid for less than 40 hours, but it is evident that an extra workday bringing the total weekly time over 40 hours would produce no change in the average effective rate.[18] The Court, basing its holding on the aim of the overtime provision as interpreted by the *Missel* case, reversed the lower courts and held the plan illegal, because to approve such an artificial scheme, it felt, "would exalt ingenuity over reality."[19] The *Belo* case, on which both lower courts had relied for their decision, was distinguished in a somewhat summary fashion.[20]

The trend of the decisions, especially as evidenced by the cases before the lower federal courts, has been away from the *Belo* case. Cases where no hourly rate was set though the weekly wages were above the minimum have presented little difficulty and have been disposed of under the *Missel* case.[21] Where the plan has included an agreed-upon rate, the first and obvious limitation has been that this contract rate must be one actually known and accepted by the employees; a mere bookkeeping transaction is insufficient.[22] Where the contract rate is subject to change with the number of hours worked, it is not the regular rate within the Act.[23] In cases very similar to the *Belo* case courts have frequently found distinguishing facts, though sometimes with doubtful perception. Thus, in *Walling v. Richmond Screw Anchor Co.*,[24] the court, faced with a plan that differed from the *Belo* plan only in that the employees received a bonus instead of a minimum guaranty in addition to set hourly wages, held it void under the *Helmerich* decision. The *Belo* case, the circuit court said, "offers difficulty" because it "involved a pay arrangement both unique and difficult to analyze."[25] Of the very few cases that have purported to follow *Walling v. Belo Corp.*, most have not involved the real problem of that case, but rather an actual reduction

[18] Under the described split-day plan of 10 hours the employee would have to work 8 days a week or, at least, 80 hours a week before his average effective rate would be increased. A similar split-day plan was held unlawful in Walling v. Alaska Pacific Consol. Min. Co., 152 F. 2d 812 (C.C.A. 9th, 1945).

[19] 323 U.S. 37, 42 (1944).

[20] Ibid.

[21] Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942); United States v. Rosenwasser, 323 U.S. 360 (1944); Seneca Coal & Coke Co. v. Lofton, 136 F. 2d 359 (C.C.A. 10th, 1943), cert. den. 320 U.S. 772 (1943); Kreeft v. R. W. Bates Piece Dye Works, Inc., 150 F. 2d 818 (C.C.A. 2d, 1945); Landreth v. Ford, Bacon & Davis, 147 F. 2d 446 (C.C.A. 8th, 1945); Kappler v. Republic Pictures Corp., 59 F. Supp. 112 (Iowa, 1945); Lorber v. Rosow, 58 F. Supp. 341 (Conn., 1944); Walling v. Stone, 131 F. 2d 461 (C.C.A. 7th, 1942); Tidewater Optical Co. v. Wittkamp, 179 Va. 545, 19 S.E. 2d 897 (1942); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (Tenn., 1941); St. John v. Brown, 38 F. Supp. 385 (Tex., 1941).

[22] Walling v. Castle, 153 F. 2d 923 (C.C.A. 5th, 1946); Walling v. West Kentucky Coal Co., 60 F. Supp. 681 (Tenn., 1944); Seneca Coal & Coke Co. v. Lofton, 136 F. 2d 359 (C.C.A. 10th, 1943), cert. den. 320 U.S. 772 (1943).

[23] Walling v. Green Head Bit & Supply Co., 138 F. 2d 453 (C.C.A. 10th, 1943).

[24] 59 F. Supp. 291 (N.Y., 1945).

[25] 59 F. Supp. 291, 293 (N.Y., 1945); see also Carleton Screw Products Co. v. Fleming, 126 F. 2d 537 (C.C.A. 8th, 1942), decided before the Belo case was affirmed by the Supreme Court.

of the effective hourly rate by agreement with employees.[26] This is permissible despite the fact that Section 18 of the Act purports to forbid such a result, since that section has been held to be no more than a pious hope.[27]

The latest indication of the questionable effect of the *Belo* case as a precedent came with two recent and again simultaneous decisions of the Supreme Court. In *Walling v. Youngerman-Reynolds Hardwood Co.*[28] the employees had formerly received piecework wages. After the Act the employer and workers agreed upon a regular hourly rate above the legal minimum, but less than the hourly average earned by piecework; for overtime hours 150 per cent of the regular rate was to be paid. However, if the piecework earnings at the old rate exceeded the wages at the hourly rate, as they almost invariably did, the workers would be entitled to the piecework wages. The second case, *Walling v. Harnischfeger Corp.*,[29] involved essentially the same plan, with the difference that the agreed-upon "regular rate" was more closely related to hourly piecework earnings, or, as it was there called, incentive bonus pay. In fact, the overtime hourly rate exceeded, though not by 50 per cent, the piecework earnings per hour.[30] The Supreme Court held both of these plans unlawful because in both cases the regular rate set up by agreement was not the significant figure of the contract and overtime should have been computed by adding 50 per cent to the average hourly piecework earnings. The Court defined "regular rate" as the quotient of the weekly earnings divided by the number of hours worked[31]—the definition

[26] In White v. Witwer Grocer Co., 132 F. 2d 108 (C.C.A. 8th, 1942) the hourly rate was reduced after the Act from $.35 to $.31 and the new rate was the basis of all payments. No minimum or bonuses were involved. Likewise in Shepler v. Crucible Fuel Co. of America, 60 F. Supp. 260 (Pa., 1943), a fixed monthly wage was commuted into a hourly wage which became the effective rate. The cases that have actually followed the Belo case have presented fact situations almost identical with that case. Walling v. Halliburton Oil Well Cementing Co., 152 F. 2d 622 (C.C.A. 9th, 1945); Atlantic Co. v. Walling, 131 F. 2d 518 (C.C.A. 5th, 1942).

[27] In a few early cases actual reductions were held unlawful. Williams v. General Mills, 39 F. Supp. 849 (Ohio, 1941); Anuchick v. Transamerican Freight Lines Inc., 46 F. Supp. 861 (Mich., 1942). Since then, however, it has become clear that Section 18 has no prohibitory effect. Shepler v. Crucible Fuel Oil Co. of America, 60 F. Supp. 260 (Pa., 1943); White v. Witwer Grocer Co., 132 F. 2d 108 (C.C.A. 8th, 1942); Remer v. Czaja, 36 F. Supp. 629 (Md., 1941). That this was the intent of Congress is indicated by the fact that violation of Section 18 was not included among the prohibitions of Section 15(a), and that penalties were not provided for its enforcement under Section 16 of the Act. 52 Stat. 1068 (1938), 29 U.S.C.A. §§ 215, 216 (1942). See also the interpretation of the Wage and Hour Administrator in Wage and Hour Division, Interpretative Bulletin No. 4, at p. 7 (1940).

[28] 325 U.S. 419 (1945). [29] 325 U.S. 427 (1945).

[30] This is shown by the following example. A worker is assigned a basic hourly rate of $.90. His average hourly earning from piecework is $1., which is lower than his overtime rate of $1.35. However, if he works 50 hours a week, the regular workweek being 40 hours, his piecework earnings of $50. will still be somewhat higher than his total pay at regular and overtime rates ($.90×40+$1.35×10=$49.50). The worker's effective hourly rate thus does not increase until he works considerably more than the statutory maximum hours. This was also the effect of the Belo plan.

[31] 325 U.S. 419, 424 (1945).

given in the *Missel* case. In a dissenting opinion Mr. Chief Justice Stone indicated that the majority opinion was inconsistent with the *Belo* case. He suggested that there was nothing in the Act which prevented in the *Youngerman* case the apportioning of the amount by which the bonus or piecework pay exceeded the guaranteed hourly wages, in proportion to the regular and overtime hours worked;[32] yet not even in his opinion was it argued that the contract hourly rate validated this plan, as was held in the *Belo* case.[33]

Since these two latest decisions of the Supreme Court it has already become clear that the Court has failed again to settle definitely the interpretation of Section 7(a). The existing uncertainty is due to the Supreme Court's insistence on harmonizing its latest holdings with that in the *Belo* case. In their most recent decisions the federal courts have reflected the holding of the *Youngerman* and *Harnischfeger* cases;[34] but in a case closely approximating the fact-situation in the *Belo* case, a lower court is practically forced to hold that the contract rate is the regular rate.[35]

Thus, in spite of the impressive array of cases in point, the employer who has readjusted his wage-and-hour policy for the purpose of the Act is still faced with some uncertainty as to the legality of this plan in so far as he relies on the *Belo* case. It is clear now that an hourly rate must be fixed and agreed upon by employers and employees since it will not be implied if a straight periodical wage is paid. Production or incentive bonuses and piecework earnings are likewise

[32] 325 U.S. 427, 434 (1945). The Chief Justice's suggestion is aimed to overcome the majority's objection that however high a piecework wage is it cannot of itself be taken to include any of the wage differential which the Act requires for overtime hours. He proposes this solution: If, for example, the piecework earnings for a 50 hour workweek total $66 and the minimum at the set hourly rate of $1 totals $55 ($1×40+$1.50×10), the $11 by which the piecework pay exceeds the minimum hourly wage should be apportioned and added to the hourly rate when computing the worker's wage. Thus, on the worker's paycheck the regular rate in this instance should be raised to $1.20. This rate, when multiplied by the hours worked, will produce the desired amount of $66 ($1.20×40+$1.80×10=$66).

Such a computation may be in harmony with the Belo case, but overlooks completely the decision in United States v. Rosenwasser, 323 U.S. 360 (1944), in which the Chief Justice concurred, which held that piecework wages had to be reduced to an hourly rate under the Fair Labor Standards Act. If such arithmetical juggling as suggested here by Mr. Chief Justice Stone is permissible, a straight piecework wage as paid in the Rosenwasser case, or even a straight weekly wage as in the Missel case, can easily be apportioned in the same way by a mere bookkeeping transaction. See also Walling v. Castle, 153 F. 2d 923 (C.C.A. 5th, 1946), where a similar arrangement was disallowed.

[33] In a short and somewhat obscure concurring opinion, Mr. Justice Frankfurter suggests that the "regular rate" in the Belo plan was not "a mere artifice unrelated to wage-earning actualities." 325 U.S. 427, 433 (1945). He fails to make clear why this is so, however.

[34] Watkins v. Hudson Coal Co., 151 F. 2d 311 (C.C.A. 3d, 1945); Walling v. Uhlman Grain Co., 151 F. 2d 381 (C.C.A. 7th, 1945). In the latter case the circuit court of appeals which had originally approved the Harnischfeger plan on the strength of the Belo case only to have its holding reversed by the Supreme Court, stated: "If the Supreme Court has not repudiated its holding in the Belo case, it has come so close as to leave no room for its application except upon an identical state of facts." Ibid., at 383.

[35] Walling v. Halliburton Oil Well Cementing Co., 152 F. 2d 622 (C.C.A. 9th, 1945). The dissenting opinion in this case contended that the Belo case was no longer reliable as a precedent. Ibid., at 624.

subject to overtime payment. The "regular rate" cannot fluctuate with the number of hours worked. The split-day plan is illegal because the hourly rates are fictitious. As for the current judicial construction of "regular rate," the only safe statement is that, where straight-time pay, bonus, or piecework earnings are commuted into hourly wages, it is the quotient of wages divided by hours, except in a situation like the *Belo* case, where it is the contract rate. The courts, however, because of the extensive inroads which have been made on the holding in that case, will be inclined to seize upon the slightest fact in order to distinguish a similar case, and to apply the general rule.[36] Probably the only safe plan for an employer who seeks to avoid an increase in total pay due to overtime is an actual reduction of the hourly rate effected through collective bargaining, but even such a reduction has been closely scrutinized and voided because it was found to be only a bookkeeping transaction.[37]

Perhaps the only justification for the *Belo* case is that its plan sought to stabilize the wages of employees with variable working hours. However, other plans with a similar aim have been voided because they did not comply with the requirements of the Act.[38] The Wage and Hour Administrator has proposed two stabilization plans which he considers legal; the time-off plan and the prepayment plan.[39] Under the first of these plans an employee who works overtime in one week is laid off a sufficient number of hours during some other week to offset the amount of overtime worked and is paid a stable wage biweekly or monthly. In the prepayment plan the employer pays the worker a sum in excess of what he earns in a particular week and the excess is considered a prepayment for overtime work in a subsequent week. Neither of the two plans is very satisfactory because both involve considerable bookkeeping and are, according to the Administrator, inapplicable to salaried employees working irregular hours;[40] thus it is not surprising that the search for another legal plan continues.

[36] Note 34 supra.

[37] Watkins v. Hudson Coal Co., 151 F. 2d 311 (C.C.A. 3d, 1945), where the court, after a close examination of old and new sample paychecks, found that the new weekly pay was exactly the same as the old wage although if the new "regular rate" had been properly used in the computation the new total would have varied very slightly from the old pay. The court concluded that the adopted "regular rate" had not actually been used in the computation and held the plan void. In indicating the difficulties involved in an actual reduction in the "regular rate," the Administrator has pointed out that employees are unlikely to acquiesce in a reduction unless the employer assures them that they will not lose any pay by it. Yet, if the employer guarantees them their former wages, their true rate of pay remains unchanged, while if there is no express or implied guaranty, the employer's payment of wages for less than a full week on the basis of the old rate would indicate that the adopted rate is a mere bookkeeping figure for the computation of overtime and not the true rate. Wage and Hour Division, Interpretative Bulletin No. 4, at p. 7 (1940).

[38] Walling v. Castle, 153 F. 2d 923 (C.C.A. 5th, 1946); Walling v. Helmerich & Payne, 323 U.S. 37 (1944).

[39] Wage and Hour Division, Interpretative Bulletin No. 4 (1940).

[40] Ibid., at 11 and 16. This results from the consideration that, since a salaried employee is entitled to full pay even if he has worked less than the regular time in a week, full pay for such a week cannot be said to be compensation for excess hours in another week.

RECENT CASES

Jurisdiction—Review of Courts-Martial by Civil Courts. [Federal].—Petitioner, a private in the United States Army, was convicted of rape by an army court-martial at Corby, England, and sentenced to a prison term of twenty-five years. Asserting that he was denied due process of law by the military authorities before and during the course of his trial, petitioner sought release by writ of habeas corpus in a federal district court. *Held*, the procedures of the military law were not applied to petitioner in "a fundamentally fair way" thus depriving him of liberty without due process of law in violation of the Fifth Amendment of the Constitution. Petitioner ordered discharged from custody.[1] *Hicks v. Hiatt.*[2]

A long line of federal cases has reiterated the doctrine that while courts-martial are ". . . . inferior courts of limited jurisdiction, whose judgments may be questioned collaterally,"[3] they form no part of the judicial system of the United States and their proceedings, within the limits of their jurisdiction, cannot be controlled or reversed by the civil courts.[4] Only if there is an absolute want of power and not merely a defective exercise of jurisdiction, is the sentence void and subject to revision by the civil courts.[5] No inquiry into the innocence or guilt of the accused is permissible.[6] The civil courts have thus limited their

[1] The court's opinion was filed on January 15, 1946. Prior thereto on January 11th, the Restoration Section of the Correction Division of the War Department acting on a review of the Donald Hicks court-martial proceeding, vacated the original court-martial sentence and restored Hicks to duty. On January 24th the court issued an order dismissing the proceedings in habeas corpus as moot. Hicks v. Hiatt, 64 F. Supp. 238, 250 (Pa., 1946). The Assistant United States Attorney, representing respondent, wrote, "No Order of Discharge having been entered no appeal was possible . . . . if such an Order of Discharge had been entered an appeal would unquestionably have been taken." Letter from Herman F. Reich, Assistant United States Attorney, Middle District, Pennsylvania, dated May 1, 1946.

[2] 64 F. Supp. 238 (Pa., 1946).

[3] Ex parte Watkins, 3 Pet. (U.S.) 193, 209 (1830).

[4] The leading case is Dynes v. Hoover, 20 How. (U.S.) 65 (1857); Ex parte Reed, 100 U.S. 13 (1879); Carter v. McClaughry, 183 U.S. 365 (1902); Sanford v. Robbins, 115 F. 2d 435 (C.C.A. 5th, 1940); Mosher v. Hudspeth, 123 F. 2d 401 (C.C.A. 10th, 1941); Ex parte Potens, 63 F. Supp. 582 (Wis., 1945); cf. Ex parte Quirin, 317 U.S. 1 (1942); Application of Yamashita, 66 Sup. Ct. 340 (1946).

[5] Carter v. McClaughry, 183 U.S. 365, 401 (1902). Thus the validity of a court-martial sentence was upheld by the Supreme Court where the same officer was a complainant, testified as a witness, and sat and passed judgment as a member of the court-martial. Keyes v. United States, 109 U.S. 336 (1883).

[6] Swaim v. United States, 165 U.S. 553, 566 (1897); see Ex parte Quirin, 317 U.S. 1, 25 (1942); Application of Yamashita, 66 Sup. Ct. 340, 344 (1946). The latter two cases deal with special military tribunals, not courts-martial, but the rule on this point is the same.

inquiries to whether the court-martial had jurisdiction of the person and subject matter, whether it was legally constituted, whether the proceedings conformed to the governing statutory regulations, and whether the sentence pronounced by the court-martial was within its powers.[7]

In view of the traditional Anglo-American distrust of the military[8] it is not readily apparent why the federal courts disavowed all appellate jurisdiction over military tribunals.[9] The constitutional argument is that since Congress is authorized to provide for the government of the armed forces by Article I of the Constitution and since the federal judiciary is set up under Article III, that therefore courts-martial ". . . . are no part of the judicial branch of the government but [are] instrumentalities of the executive provided for disciplinary purposes."[10]

The underlying policy argument with which this interpretation has been fortified is that military law is a peculiar body of law separate from and foreign to the common law and therefore beyond the purview of common-law judges. Not only are common-law judges held not competent to administer this law, but it is further argued that any attempt by them to do so would undermine military discipline and impair the efficiency of the armed forces.[11]

[7] Cases cited in note 4, supra. While there is considerable dicta stating that courts-martial proceedings must conform to the governing statutory regulations, no writ of habeas corpus has ever been granted because of a court-martial's failure to so conform. This can best be understood in terms of the summary nature of courts-martial and the considerable leeway given commanding officers in the use of courts-martial as courts of punishment before the revision of the Articles of War in 1920. Procedural safeguards such as pre-trial investigations, or the accused's right to counsel of his own choice were not required by the statute and consequently the civil courts were reluctant to disturb findings on procedural grounds when the procedural requirements were so ill-defined. Such reluctance has not been in order since the 1920 reforms.

[8] The English fear of the standing army is reflected in the annual Mutiny Acts, military codes passed by Parliament which along with the military appropriation had to be passed yearly, thus keeping the army under legislative control. This device of limited military appropriations was incorporated in the United States Constitution, Article I, Section 8. Most of the state constitutions framed during the Revolutionary War contained declarations to the effect that the military should be under strict subordination to and control of the civil power. See argument for petitioner in Ex parte Milligan, 4 Wall. (U.S.) 2, at 37 (1866); Glenn, The Army and the Law 34 (Schiller's ed., 1943); 1 Winthrop, Military Law and Precedents 8 (2d ed., 1896).

[9] "Throughout the reported cases [English], from 1786 to the present day, there appears a conflict between two principles: the protection of the fundamental rights of the subject from unlawful and undue invasion; and the desirability, on the grounds of discipline and efficiency, of leaving matters of military law and discipline exclusively to the jurisdiction of military tribunals." 24 Can. Bar Rev. 210, 211 (1946).

[10] Arnold, Military Law, 10 Encyc. Soc. Sci. 453, 455 (1933); In re Vidal 179 U.S. 126 (1900); Ex parte Dickey, 204 Fed. 322 (Me., 1913); United States v. Maney, 61 Fed. 140 (C.C. Minn., 1894). This argument is augmented by Article II, Section 2 of the Constitution, making the president commander-in-chief of the armed forces.

[11] See Smith v. Whitney, 116 U.S. 167, 178 (1886); United States v. Clark, 31 Fed. 710, 713 (C.C. Mich., 1887); Ex parte Henderson, 11 Fed. Case No. 6, 349, at 1069 (C.C. Ky., 1878); see also Fletcher v. United States, 26 Ct. Cl. 563 (1891) making the point that a court-martial is "a court of honor" and that, "in military life there is a higher code termed honor which holds

This dubious rationale has been parroted by the courts without re-examination well up to the present time.[12] In 1943, however, the eighth circuit court of appeals looked behind the jurisdictional question and sent a habeas corpus petition back to the district court for rehearing in a case where the uncontroverted allegations indicated that the petitioner had been sentenced to prison by an army court-martial in a patently unfair proceeding.[13] Stating that "the judgment [of the court-martial] did not carry with it the presumptions of legality and validity which protect the judgment of a civil court of general jurisdiction against collateral attack,"[14] the court concluded that in view of the trend of modern Supreme Court decisions granting habeas corpus petitions to persons convicted by state courts under circumstances showing a want of due process of law,[15] petitioner was entitled to release, if his allegations were true.[16] One year later the third circuit court of appeals, by way of dicta, elaborated upon this fresh approach:

> . . . . the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them *in a fundamentally fair way*. We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody.[17]

It is this dicta upon which the court in the instant case relies, but the granting of habeas corpus by the court on the grounds that the petitioner had been deprived ". . . . of the substance of a fair trial" and further, that "the procedures of the military law . . . . had not been applied to Hicks in a fundamentally fair way"[18] is based upon errors which fall far short of the deprivations of due process which the courts have required in previous habeas corpus cases applying the "fundamental fairness" test.[19] The errors cited to support the conclusion

---

its society to stricter accountability, and it is not desirable that the standard of the army should come down to the requirements of the criminal code." Lobb, Civil Authority versus Military, 3 Minn. L. Rev. 105, 116 (1919); Winthrop, op. cit. supra, note 8, at 62.

[12] Ex parte Potens, 63 F. Supp. 582 (Wis., 1945). Several state court decisions, in dealing with state militias, broke away from the federal precedents. Garling v. Van Allen, 55 N.Y. 31 (1873); Higgins v. Stotesbury, 182 App. Div. 691, 169 N.Y. Supp. 998 (1918); see Lobb, op. cit. supra, note 11, at 115.

[13] Schita v. King, 133 F. 2d 283 (C.C.A. 8th, 1943). [14] Ibid., at 287.

[15] Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Smith v. O'Grady, 312 U.S. 329 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938).

[16] Upon rehearing, the alleged irregularities in the court-martial proceedings were not proved by petitioner and the writ of habeas corpus was dismissed. Aff'd, Schita v. Cox, 139 F. 2d 971 (C.C.A. 8th, 1944).

[17] United States v. Hiatt, 141 F. 2d 664, 666 (C.C.A. 3d, 1944) (italics added).

[18] Hicks v. Hiatt, 64 F. Supp. 238, 250 (Pa., 1946). [19] Cases cited in note 15, supra.

reached here are several. (1) When first arrested, Hicks, by being wrongfully told that any information he gave would be used to help him, was induced to make a false statement which was used to discredit him at the trial.[20] (2) Hicks's contentions as to prior carnal knowledge of Mrs. Murray, the complaining witness, were not completely investigated by the investigating officer.[21] (3) Irrelevant and hearsay evidence damaging to Hicks was allowed to be introduced at the trial.[22] (4) Evidence favorable to Hicks was excluded at the trial.[23] (5) Evidence favorable to Hicks was not introduced at the trial by Hicks' counsel.[24] The court-martial found Hicks guilty without his guilt being proved beyond a reasonable doubt.[25] (7) The reviewing authorities abused their legal discretion by not ordering a new trial.

The federal courts have been uniformly strict in finding lack of due process in criminal proceedings only in cases of out and out travesties of justice such as the procuring of a confession by torture,[26] or conviction in a trial dominated by mob violence,[27] and in not applying the remedy to errors of an evidentiary nature.[28]

[20] Hicks told the military policeman that he spent the balance of the night after the alleged rape at a near-by barracks when actually he was at the home of another married woman. This was brought out by cross-examination at the trial which served to incriminate and degrade Hicks although it had no relation to the crime charged. Hicks v. Hiatt, 64 F. Supp. 238, 243 (Pa., 1946).

[21] Hicks named three friends who he said knew of his prior association with Mrs. Murray. The investigating officer had two of these men meet her but when they denied ever having seen her with Hicks, the third witness was, erroneously, not taken to see her. Further, considerable evidence as to Mrs. Murray's unchaste reputation in the community was ignored due to a mistaken belief as to its inadmissibility as evidence under the hearsay rule. Ibid., at 242.

[22] A clerk present at the pre-trial interrogation of Hicks was allowed to testify that Hicks was an evasive and reluctant witness. The trial judge advocate was permitted to make statements as to Hicks' failure to make a sworn statement before trial which were improper. The town constable was allowed to testify as to the thickness of a party wall between Mrs. Murray's and a neighbor's apartment though he had never measured the wall. This evidence tended to show that Mrs. Murray's screams would not have been heard next door. Ibid., at 241.

[23] Evidence as to Mrs. Murray's unchaste reputation was excluded. Ibid., at 241–42.

[24] Hicks asked his counsel to call three townspeople he knew to testify as to Mrs. Murray's unchaste reputation but this was not done. Ibid., at 245.

[25] In a letter to the reviewing authorities requesting clemency five days after passing sentence, the president of the court-martial indicated that there was doubt in the court's mind as to whether Mrs. Murray took all normal precautions to avoid the act of sexual intercourse. Ibid., at 247.

[26] Brown v. Mississippi, 297 U.S. 278 (1936).

[27] Moore v. Dempsey, 261 U.S. 86 (1923). Justice Frankfurter, concurring in Malinski v. People of State of New York, 324 U.S. 401, 416 (1945), points out that a finding of violation of the due process clause in a criminal proceeding requires of the reviewing court ". . . . an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ."; see Lisbena v. California 314 U.S. 219, 236 (1941). The district court in the instant case conceded that ". . . . no one intended to deny the petitioner a fair trial. . . . ." Hicks v. Hiatt, 64 F. Supp. 238, 249 (Pa., 1946).

[28] Harlan v. McGourin, 218 U.S. 442 (1910); McMullen v. Squier, 144 F. 2d 703 (C.C.A. 9th, 1944); Miller v. Hiatt, 141 F. 2d 690 (C.C.A. 3d, 1944); Carpenter v. Hudspeth, 112 F. 2d 126 (C.C.A. 10th, 1940).

While the reviewing authority exercising appellate jurisdiction should have negated the proceedings in this case, the writ of habeas corpus is a particularly clumsy device for rectifying such errors. Habeas corpus is a summary proceeding.[29] It was not originally developed, nor is it now appropriate to use it for securing an additional review of a trial already carried to finality by a court having jurisdiction which has been exercised lawfully. Irregularities not working a substantial injustice are not within its scope.[30]

Aside from the questionable applicability of the court's remarks in *United States v. Hiatt* to the circumstances in the principal case, it is not certain whether the dictum in that case would be accepted by the Supreme Court. In *Application of Yamashita*[31] the majority of the Court reaffirmed the traditional rule that civil courts would look only to the jurisdiction of the military tribunal. However, they were careful to point out that it was "unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied."[32] The significance of this remark seems apparent in view of the nationality of the petitioner and the nature of the crimes charged. The Yamashita case did not raise questions as to the fairness of the American court-martial system.

It is the current popular dissatisfaction with the way the court-martial system has functioned during the war which may best explain the unusual result in *Hicks v. Hiatt*.[33] This dissatisfaction has resulted to some extent from the malfunctioning of a legal system burdened with historical anachronisms and ". . . . elaborated for an army of professionals rather than an army of drafted citizen-soldiers."[34] It has been due partly to the inexperience and, all too often,

[29] See the Judicial Code, Rev. Stat. § 761 (1875), 28 U.S.C.A. § 461 (1928).

[30] While evidentiary errors could appropriately be reviewed by mandamus, prohibition, or certiorari, the federal courts have always refused to exercise such appellate jurisdiction over courts-martial. In proceedings other than habeas corpus they have passed upon the jurisdiction of military tribunals only in suits before the Court of Claims to recover pay or in civil suits for false arrest. This denial of appellate jurisdiction by the federal courts is by now so thoroughly ingrained in the law that it would require an act of the legislature to change it. See Stein, Judicial Review of Courts Martial, 11 Brooklyn L. Rev. 30, 60 (1941). In a recent Canadian case a writ of prohibition was granted to prevent a new trial by court-martial of a soldier freed on habeas corpus after a prior military proceeding. King v. Thompson, O.W.N. 217 (1946), noted in 24 Can. Bar Rev. 210 (1946).

[31] 66 Sup. Ct. 340 (1946).

[32] Ibid., at 351.

[33] "After the termination of the present war, the American system of military justice will, in all probability, become a subject of criticism and reform. This is likely to happen not because the American system is inadequate or unfair but simply because a war of the magnitude of the present one constitutes a test which the American system has not undergone before and which will suggest improvements even in the best system of military justice." Rheinstein, Military Justice, in Puttkammer, War and the Law 155, 159 (1943).

[34] Ibid. See Ansell, Some Reforms in Our System of Military Justice, 32 Yale L. J. 146 (1922); N.Y. Times, p. 1, col. 3 (April 21, 1946); Chicago Daily News, p. 9, col. 1 (Nov. 1, 1945); Baldwin, The G. I. and the Brass, 58 Infantry Journal, No. 5, at 13 (May, 1946); Rosenblatt, Justice on a Drumhead, 162 Nation, No. 17, at 501 (April 27, 1946). But see,

to the outright incompetence of an administering personnel untrained in the law and faced with a huge legal task. A still greater source of dissatisfaction has been the uneven and haphazard way in which the regulations have been applied at different times and places and among different units. But by far the basic failure of military justice in this war has been the unequal manner in which punishments have been meted out to enlisted men on the one hand and to officers on the other. This double standard of justice, so foreign to basic Anglo-American doctrines of fair play, has been brought to public attention as never before.[35]

Another explanation of the result of this case is the nature of the crime of rape itself. It is not a crime exclusively within the purview of military law as is, for example, "conduct unbecoming an officer," or "conduct prejudicial to good order."[36] It is particularly amenable to false charges and raises very delicate problems of proof.[37] Finally, the army has been uniformly severe in punishing convictions for rape.[38] Thus, in a close case such as this a common-law judge would readily tend to be extra-sensitive to procedural errors which have prejudiced the accused and lead to conviction and sentence.

Many reforms in military law and procedures are now being considered. Among them are a requirement that trained lawyers responsible only to the judge-advocate general sit on courts-martial, a differentiation in treatment of personnel in combat zones and in areas where more normal conditions prevail,

---

Greenbaum, The Case for Army Justice, 162 Nation, No. 22, at 658 (June 1, 1946). Ansell points out that the American system of military justice is, in its essentials, the medieval British code based on personal fealty, a code long ago cast aside by the English. Ansell, supra, at 148.

[35] See materials cited in note 34, supra. One example was the Selfridge Field army scandal. The commanding officer of the field, a colonel, along with lower ranking field personnel, was engaged in selling promotions and transfers to enlisted men. He had, in addition, misappropriated government property, accepted bribes, was often drunk, and finally brought the matter to a head by shooting a Negro private while drunk. A court-martial found him guilty of "conduct prejudicial to good order and military discipline" and "careless use of firearms" and sentenced him to reduction to the rank of captain with promotion barred for three years. A master sergeant, implicated in the selling of the transfers, received a dishonorable discharge and eighteen months imprisonment at hard labor. This shocking disparity in punishment received wide publicity and caused great public indignation. 42 Time, No. 11, at 67 (Sept. 13, 1943); 42 Time, No. 13, at 65 (Sept. 27, 1943); 42 Time, No. 16, at 64 (Oct. 18, 1943).

[36] Articles of War 95 and 96, 41 Stat. 806 (1920), 10 U.S.C.A. §§ 1567, 1568 (1927). During peacetime, military personnel charged with rape or murder committed in the United States must be tried by the civil courts. Articles of War 92, 41 Stat. 805 (1920), 10 U.S.C.A. § 1564 (1927).

[37] "In a case in which a man is charged with a sexual offense against a female the words of Sir Matthew Hale relative to rape should be remembered: 'It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused though innocent.'" Moriarty, Police Law 78 (8th ed., 1945).

[38] The Articles of War provide that, "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life as a court-martial may direct." Art. of War 92, 41 Stat. 805 (1920), 10 U.S.C.A. § 1564 (1927).

stricter requirements of thorough and impartial pre-trial investigation,[39] a reduction in the punishment for rape, and some measure of control over courts-martial proceedings by civil authorities.[40] The abandonment of the principle, deeply imbedded in our system of military justice, that courts-martial are not courts of law but mere instruments of command for the purpose of enforcing discipline, is long overdue.[41]

The instant case suggests that the civil courts are prepared to ignore traditional concepts in order to correct abuses by military courts. However, it is apparent that the reforms needed today call for comprehensive revision of military law and courts-martial procedure by Congress and not a piecemeal and uncertain attack by the civil courts.

Personal Property—Possession—Finder's Right to Chattel Superior to Owner of Premises—[England].—The defendant purchased a house in 1938, but he did not occupy it. The house remained unoccupied until it was requisitioned by the Army in 1940. The plaintiff, a soldier, was stationed in the house when he found a brooch in the crevice of a window frame. He turned it over to the police, who, unable to find the true owner, gave it to the defendant. The plaintiff sued for the return of the brooch or its value. *Held*, the plaintiff is entitled to judgment because the defendant had neither known of the brooch nor had he ever had physical possession of the premises on which it was found. The true owner being undiscovered, the finder has good title. *Hannah v. Peel*.[1]

[39] Specifically, the recommendations are that failure to have a thorough and impartial pre-trial investigation and further, the use of oppressive and threatening practices to force admission in investigation would be *jurisdictional errors*. In England, "it is firmly established in military law that the investigation of the case by the commanding officer, in the prescribed manner, is vital to the jurisdiction of a court-martial." 24 Can. Bar Rev. 210, 211 (1946); cf., suggested reforms of the English court-martial system in an earlier period, 47 Law Times 219 (1869).

[40] See N.Y. Times, § 1, p. 1, col. 3 (April 21, 1946), listing the suggested reforms to the Articles of War made by a special subcommittee of the House of Representatives Military Affairs Committee. Other recommendations included placing enlisted men on courts-martial when enlisted men are being tried, giving increased publicity to courts-martial and inviting public attendance, providing for more adequate reviews of proceedings. See Rosenblatt, op. cit. supra, note 34, for additional recommendations. The War Department has appointed an advisory board on military justice with members selected by the American Bar Association to review the entire court-martial procedure.

[41] See Ansell, op. cit. supra, note 34, at 149; Bruce, Double Jeopardy and Courts-Martial, 3 Minn. L. Rev. 484 (1919). There is much to be learned from the military law of other countries. In England ". . . . the High Court can control the proceedings of courts-martial by means of the prerogative writs, by actions for damages and for injunctions against individual officers who exceed their jurisdiction . . . . and by criminal prosecutions of such officers. . . . ." 75 L. J. 336 (1933). In Nazi Germany and France there were two different systems of military justice for war and peace, professional lawyers sat on the courts-martial, appellate courts were provided for full review and in Germany enlisted men sat on courts-martial. Rheinstein, op. cit. supra, note 33, at 168, 170.

[1] [1945] K.B. 509.

Although relatively few in number, the cases on finder's rights have provoked an extraordinary amount of learned discussion, partly because the decisions usually turn on the point of who has possession.[2] It is with possession that metaphysics gains its flimsy foothold in the law of property,[3] and the problem of the finder is among the most abstruse of possessory questions. In view of the complexity of many modern property interests, it might be expected that the problem would be more complex than it actually is, but the finder usually finds only a chattel of a small or movable nature. One is unlikely to find a lost or mislaid corporation, factory, or steam shovel. The problem is not clouded by the peculiar rules of admiralty[4] or real property.[5] Usually the chattel found is capable of reduction to possession in a physical sense,[6] and the finder once having so reduced it has only the duty of seeking the true owner.[7] If the latter cannot be found, then the finder has good title.[8]

The foregoing analysis is probably true as a generalization but it begs the question of who is a "finder" as that term is used by the courts to exclude mere temporary possessors of the goods of an occupier of premises. Thus in the instant case,[9] the owner of the house claimed he had a continuing prior possession

[2] ". . . . the scholarly literature on possession bears quantitatively the same relation to the case-law and practice as the literature on *Hamlet* to the play itself." Riesman, Possession and the Law of Finders, 52 Harv. L. Rev. 1105 (1939).

[3] See the philosophical attacks on the problem discussed in Holmes, The Common Law 206–46 (1881); Pollock and Wright, Possession in the Common Law (1888); Salmond, Jurisprudence 364–415 (Parker's 9th ed. 1937).

[4] In admiralty, the finder ("salvor") of a lost vessel or cargo has a sizable lien on found items against the true owner. See 1 Benedict, Admiralty § 117 (6th ed., 1940). His title is good against all the world but the true owner. There are apparently no admiralty cases of conflict between a finder and the owner of the premises on which the article is found, probably because any imaginable situation would remove the case from the admiralty jurisdiction. One variety of such a situation was presented in the case of Antonio G. D'Elia, reported in A5 Corporate Reorganizations 20 (1942) (opinion of referee in U.S. D.C. Cal., 1941).

[5] The policy considerations governing the law of adverse possession and squatter's rights in real property differ from those controlling chattels because of the destructibility and mobility of the latter. See 1 Tiffany, Real Property § 1 (3d ed., 1939); Maitland, The Law of Real Property, in 1 Collected Papers 162, 171 (1911). The real property distinctions do enter, of course, in determining whether the finder is a trespasser or one on the premises of right.

[6] At first sight it might appear impossible to find an intangible interest. But suppose that A discovers in B's house a manuscript of the work of an undiscoverable poet. A, not a trespasser, copies the poem and sells it. Did B have any property in the poem that is capable of being stolen? There are apparently no cases on this point.

[7] This duty seems to be rather negative; the finder runs a risk of being held for conversion if he sells the chattel, and some cases find him guilty of larceny. Brown, Personal Property § 15 (1936). In some jurisdictions he has a statutory duty of seeking the owner. See Ill. Rev. Stat. (1945) c. 50, § 28, where the finder is required to advertise. This is a standard provision of the statutes concerning finders' rights.

[8] Cleveland R. Co. v. Durschuk, 31 Ohio App. 248, 166 N.E. 909 (1928); People v. Beach, 62 Cal. App. 2d 803, 145 P. 2d 685 (1944).

[9] The court treated the problem of the relation of the parties as unimportant since it was clear that the plaintiff was on the premises of right (was not a trespasser) and he was in no

of the brooch, such as would prevent the plaintiff from becoming a true finder.[10] By the court's reasoning, if the owner had at one time seen the brooch and left it where it lay, he would have possessed it; for the decision not to move the object is as much an exercise of control as the moving of the object, and control is one of the elements in the construction of possession.[11] Here the owner of the house would not be entitled to the brooch solely by his purchase of the house,[12] and not knowing of the brooch and never having occupied the premises, it was said that he had exercised no control over the lost chattel. But he had a general power, prior to the Army's occupancy of the house, to keep strangers out, and thus to prevent others from possessing the unknown chattel. Thus strictly speaking, any owner of premises has control over an article therein.

The lack of knowledge of the chattel or of the nature of the premises cannot, however, suffice to defeat the owner of the premises. There could be an intent on his part to reduce all lost or mislaid articles to possession,[13] even without knowing of them. Such an intent, however, must be actual, not constructive. Thus a purchaser might wish to buy a house on the possibility of finding old letters or documents therein, and thus be said to possess the papers, even if he knew only of the bare possibility of their existence. Or a railroad may intend to possess all parcels left behind by passengers, and so notify the public.[14] But the

---

special relationship to the defendant (was not his servant or agent). A servant, it is sometimes said, cannot find against his master. This seems to be the rule of South Staffordshire Water Co. v. Sharman, [1896] 2 Q.B. 44, at least according to Salmond, op. cit. supra, note 3, at 384. If this rule exists, it is not followed in most American cases. Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N.E. 2d 661 (1935).

The court in the instant case appears to be the first to realise that the true doctrine of Bridges v. Hawkesworth, 21 L.J.Q.B. 75 (1851), is that the place of finding is immaterial except in so far as it affects the status of the finder (i.e., whether he is a trespasser). See, Does the Place Where a Lost Article Is Found Determine the Rights of the Finder?, 15 Ky. L. J. 225 (1927).

[10] See Elwes v. Brigg Gas Co., 33 Ch. Div. 562 (1886); Pollock and Wright, op. cit. supra, note 3, at 41.

[11] Thus, where the owner of a car is forced at the point of a gun to drive for a thief, he is no longer in control and has lost possession. Root v. State, 25 So. 2d 180 (Ala. App., 1946), aff'd 25 So. 2d 182 (Ala., 1946).

[12] This statement must be qualified by the dicta mentioned in note 10, supra, as to real property, where it is generally stated that the owner owns all that is on or in the land. The cases so stating usually concern buried objects, and the American cases favor the finder. Zornes v. Bowen, 223 Iowa 1141, 274 N.W. 877 (1937) (money beneath floor of house goes to finder); Vickery v. Hardin, 77 Ind. App. 558, 133 N.E. 922 (1922) (coins in ground go to finder). Contra: State ex rel. Scott v. Buzard, 235 Mo. App. 636, 144 S.W. 2d 847 (1940). In the case of chattels, it is clear that the mere purchase of an article does not convey unknown objects contained in it. Durfee v. Jones, 11 R.I. 588 (1877).

[13] Merry v. Green, 7 M. & W. 623 (Ex., 1841).

[14] See Foulke v. New York Consolidated R. Co., 228 N.Y. 269, 127 N.E. 237 (1920). This intent is implied where the occupier is in a fiduciary relationship with the supposed true owner. Thus a safe deposit company has a claim superior to that of a finder as to articles found in the company's rooms. Silcott v. Louisville Trust Co., 205 Ky. 234, 265 S.W. 612 (1924).

mere purchase of premises does not, as a matter of law, imply an intent to possess any unknown chattel therein,[15] despite the intent of most owners to exclude others from the premises in which the unknown chattel lies. There must be some sort of knowledge or awareness of the article to give rise to the intent. Because of the lack of either control or intent on the part of the owner of the premises in the instant case, the court awarded title to the finder.

It is difficult to see any considerations of practicality or justice which lead to the firmly established doctrine that a finder, as a prior possessor, has a better claim than the occupier. It has been suggested that a romantic outlook on life has found its way into our law in the favoring of finders.[16] In any event, it is probable that the cases on finders' rights represent an extreme example of the mechanical application of a concept. A sensitivity to the subtleties of possession has led the courts to conclusions which ignore the ordinary ideas of purchase and which are inconsistent with common doctrines of property.[17] In most of the cases, the determination of which party was prior possessor is a pleading of the conclusion. The common law principle of the protection of possession has been defended as good sense, because it satisfies in an orderly manner an irradicable instinct, that of defending what one holds in one's hand.[18] But in contemporary society, the instinct to defend what lies on one's land is probably nearly as fundamental, and it should be of no concern to the law that one instinct is shared with the animals and the other is a product of the society itself.

The extremes to which the American courts have gone in protecting the finder lead to impractical conclusions. There is little probability of fraud in the possession of lost articles by the owner of the premises, whereas there is more than a suspicion of fraud or theft in many "findings." If we are concerned with the position of the true owner, it is preferable that the chattel is retained by the owner of the premises where it was lost or mislaid. Attempts to split the custody of the article from the legal interest therein by awarding the custody to the occupier of the premises, but awarding title to the finder if the true owner cannot be found, are also impractical. The system would be too complex to be applied to such small transactions.

In the instant case, society cannot be said to have any independent interest in the ownership of the brooch, and an economical disposition of the problem should be to award title to the occupier of the premises. However, even the medieval law recognized the paramount interest of the community in more valu-

[15] Some of the American cases go so far as to permit a trespasser to find against the owner of the land. Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935).

[16] Riesman, op. cit. supra, note 2, at 1112. Possibly this favoritism has deeper roots. At least it seems to be a recurrent phenomenon with children.

[17] Thus the case of buried objects going to the finder seems inconsistent with the common law doctrine of usque ad inferos. See 2 Tiffany, Real Property § 585 (3d ed., 1939).

[18] Holmes, The Common Law 213 (1881).

able items by awarding to the king all treasure trove wherever found.[19] Possibly today the true owner of really valuable chattels can always be discovered, and hence the law should develop rules solely for the disposition of small articles. But it is not beyond possibility, especially after the war, that the abandoned equipment of dissolved corporations may be subject to a true finding,[20] and at the time be a sizable windfall. Even if it is assumed that some incentive should be given for finding or reporting findings, it is not clear why a casual finder should be so generously rewarded.[21] Despite his limited award the salvor of ships is often a professional.[22] However, any law attempting to seize for the state all lost or mislaid articles[23] is apt to be unenforceable because the community can have no interest in prosecuting sporadic claims rarely exceeding a hundred dollars in value. Statutes attempting to give the government such rights have become dead letters probably for this reason, and hence have often been ignored when items of large value are found.

Sherman Antitrust Act—Patents—Legality of Cross-licensing Agreement between Owners of Complementary Patents Setting Prices at which Sublicensees Sell Patented Articles—[Federal].—The two principal defendants, Line Material Company and Southern States Equipment Corporation, owners of complementary patents for dropout fuse cutouts, executed a cross-licensing agreement authorizing one of the patentees to sublicense other manufacturers under both patents on condition that the sublicensees would not sell the patent-

[19] This doctrine still survives in England. Attorney-General v. Trustees of the British Museum, [1903] 2 Ch. 598; Emden, The Law of Treasure-Trove, Past and Present, 42 L.Q. Rev. 368 (1926). The American cases usually ignore the distinction between ordinary chattels and treasure trove, and award the latter to the finder. Groover v. Tippins, 51 Ga. App. 47, 179 S.E. 634 (1935); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904).

[20] It is not always possible to locate the stockholders of a dissolved corporation. See In re Hull Copper Co., 46 Ariz. 270, 50 P. 2d 560 (1935), where, on liquidation, $46,309.20 was left after all stockholders who could be located had been paid.

[21] Seven of the American jurisdictions limit the finder by statute, some giving part of the find to the government. See Mich. Stat. Ann. (Henderson, 1937) § 18.708 (town gets one-half); Ore. Code Ann. (1941) § 70–704 (county gets one-half); N.H. Rev. Laws (1942) c. 270, § 6 (town gets all).

[22] Robinson, Admiralty Law in the United States § 99 (1939). Some statutes take an admiralty analogy and allow the finder a lien against the true owner for more than the finder's expenses. Iowa Code (1939) § 12211 (10 per cent of value); Ala. Code Ann. (Michie, 1940) c. 47, § 157 ("reasonable" reward).

[23] American statutes dealing with the subject tend to emphasize the interest of the community. See provisions mentioned in note 21, supra. These provisions appear to be dead letters, and in any case none of them clarify the relationship of finders and owners of premises. See Weeks v. Hackett, 104 Me. 264, 71 Atl. 858 (1908), where the find was called "treasure trove" and thus removed from the statute. General ignorance of the statutory provisions means that there is no public cooperation. Statutes dealing with escheat have met with slightly greater success, but still encounter judicial hostility. See Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 58 (C.C.A. 7th, 1939).

ed products at prices lower than those fixed by the patentees in sales to their own customers. Ten defendant sublicensees signed license agreements which, under an escrow agreement, became effective when three out of five named manufacturers in addition to the licensors and the General Electric Company also signed. Price schedules were drawn up by the joint efforts of eight of the twelve defendants and were subsequently adhered to by all the parties. In a civil action by the Government under the Sherman Act, *held*, that the agreement between the principal defendants is not in violation of the antitrust laws and therefore the case against the other defendants falls. *United States v. Line Material Co.*[1]

The borderline between the scope of the patent statute[2] and the operation of the antitrust laws is uncertain.[3] Nowhere has the conflict appeared more strikingly than in litigation concerning price-fixing. It is usually said that under the Sherman Act price-fixing is illegal per se.[4] The courts have sought to define the degree of immunity to that prohibition which a patentee enjoys in a series of cases which began by giving broad protection to the patentee.[5] But it has been established that a patentee may not control the resale price of a patented article;[6] nor may he constitute his competitors "agents" for that purpose.[7] The patentee may not fix resale prices of unpatented articles and services "tied-in" with the patented product[8] nor of patented articles which the patentee does not manufacture.[9] And a patentee who partially fabricates a patented product and sells it to his licensees to finish under the patent may not determine the selling price of the finished article.[10] In one situation, however, the Supreme Court has

[1] 64 F. Supp. 970 (Wis., 1946).

[2] 46 Stat. 376 (1930), 35 U.S.C.A. § 40 (1941).

[3] 50 Stat. 693 (1937), 15 U.S.C.A. § 1 (1941). See Wood, Patents and Antitrust Law (1942); Hamilton, Patents and Free Enterprise, T.N.E.C. Monograph No. 31 (1941); Petro, Patents: Judicial Developments and Legislative Proposals, 12 Univ. Chi. L. Rev. 80, 352 (1944); Kelleher, Price-fixing under Patent License Agreements, 3 Mont. L. Rev. 5 (1942).

[4] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940), United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[5] Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288 (C.C.A. 6th, 1896); Bement v. National Harrow Co., 186 U.S. 70 (1902); Victor Talking Machine Co. v. The Fair, 123 Fed. 424 (C.C.A. 7th, 1903); National Phonograph v. Schlegel, 128 Fed. 733 (C.C.A. 8th, 1904).

[6] Boston Store v. American Gramaphone Co., 246 U.S. 8 (1918); Bauer & Cie. v. O'Donnell, 229 U.S. 1 (1913). A limited exception to the rule was created in the case of trade-marked commodities by the Miller-Tydings Act, 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941).

[7] United States v. Masonite Corp., 316 U.S. 265 (1942).

[8] Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944). Nor may the owner of a process patent fix, by license agreement, the price at which his licensee-manufacturer sells the unpatented product. Barber-Colman Co. v. National Tool Co., 136 F. 2d 339 (C.C.A. 6th, 1943).

[9] See United States v. Vehicular Parking, Ltd., 54 F. Supp. 828, 838 (Del., 1944).

[10] United States v. Univis Lens Co., 316 U.S. 241 (1942).

given positive sanction to an agreement by which a patentee determined the selling price at which his licensee sold the patented articles. In *United States v. General Electric Co.*[11] the defendant had licensed the Westinghouse Company to make, use, and vend electric light bulbs under General Electric patents on condition that prices and terms to customers of Westinghouse would be those determined from time to time by General Electric in sales to its own customers. Mr. Chief Justice Taft said that the price restrictions were ". . . . normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly"[12] and that the license agreement was not illegal under the Sherman Act. More recent decisions seem to have narrowed that principle,[13] but the Supreme Court has refused expressly to overrule the *General Electric* decision.[14] A vague area remains within which price fixing by a patentee may be legal. Thus, in the present case the court held that the *General Electric* case was controlling and that the agreements fixing prices were valid.

In several respects the holding in the present case is an extension of the doctrine of the *General Electric* case. That case and the case of *Bement v. National Harrow Co.*,[15] upon which it was based, decide only that where A, a patentee who manufactures and vends to the public, licenses B to manufacture and vend on condition that B may not undersell him, the contract is not illegal.[16] But

[11] 272 U. S. 476 (1926). There were two separate agreements involved in the case but the first one, dealing with del credere agencies, is not relevant here. Subsequent references to the General Electric case pertain only to the license agreements between General Electric and Westinghouse.

[12] Ibid., at 490.

[13] See United States v. Vehicular Parking, Ltd., 54 F. Supp. 828, 838 n. 14 (Del., 1944).

[14] In United States v. Univis Lens Co., 316 U.S. 241 (1942) the defendants relied upon the General Electric decision to support a licensing arrangement under which the patentee sold unfinished lens blanks to wholesalers and retailers and set the prices at which the finished lenses were sold. The Government urged that the case called for an overruling of the General Electric decision. Although the Court held the licensing arrangements to violate the Sherman Act, it refused to overrule the General Electric decision. Ibid., at 252.

[15] 186 U.S. 70 (1902).

[16] Actually both the Bement case and the General Electric case represented industry-wide price-fixing schemes but in neither case was that fact before the Court. In the former case the Court said, "The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their contents alone and construed accordingly." Bement v. National Harrow Co., 186 U.S. 70, 85 (1902). The trial court in the General Electric case excluded consideration of agreements with other competitors of General Electric and Westinghouse. "[General Electric] . . . . has also licensed some 13 other manufacturers . . . . but as to these 13 no complaint is made, and their activities, as well as their relations to the General Electric Company, are not involved in this controversy." United States v. General Electric Co., 15 F. 2d 715, 716 (D.C. Ohio, 1925). As a matter of fact the agreement between Westinghouse and General Electric was a cross-licensing agreement by which Westinghouse agreed to license General Electric under any patents it then had or

the Sherman Act prohibits "combinations" and "conspiracies" as well as "contracts" in restraint of trade.[17] In the present case there was not a single patentee but two competitors owning complementary patents. The court found that the principal defendants did not pool their licenses for the purpose of fixing prices and yet the first agreement entered into between the patentees made price-fixing provisions mandatory in all sublicenses. Here, also, the licensees were not a single manufacturer but ten competitors acting in undisguisable concert.[18] Here minimum prices were not, as in the *General Electric* case, determined by the patentees, but were the fruit of "joint efforts of all defendants except Porcelain Pacific, Johnson and Royal."[19] In the *General Electric* case the patentee determined the price at which his licensee might sell, but in the *Line* case the patentees have attempted to bind themselves not to sell below fixed prices.[20] The conclusion seems inescapable that the agreements and acts of the parties here go beyond the simple situation described by Mr. Chief Justice Taft in the *General Electric* case. It is true that in the present case the court emphasized the fact that the patentees held complementary, rather than competing, patents.[21] The necessity of cross-licensing in this situation seems undeniable. But the

---

might in the future acquire. Record, United States v. General Electric Co., No. 113 (U.S. October Term, 1926), 117. The Court, however, did not discuss the question. Thus both the Bement case and the General Electric case were concerned only with the narrow question of a license contract between two parties.

[17] 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941).

[18] A meeting was held in New York on June 1, 1939, attended by six of the then prospective licensees. At that time Southern was licensor for the patentees. The six participants at the meeting decided that they would prefer to be licensed by Line; their wish was conveyed to the patentees and complied with by the execution of a new agreement by which the patentees exchanged places and Line became licensor. United States v. Line Material Co., 64 F. Supp. 970, 974 (Wis., 1946).

The court also mentions another meeting held in Chicago in October, 1938, attended by seven of the prospective licensees at which meeting the form of the proposed licenses was discussed. The opinion does nor elucidate the means of communication used by eight of the twelve defendants in the "joint action" by which they drew up price schedules in the fall of 1940. But the brief for the principal defendants concedes that there was a meeting of the licensees on September 4, 1940, at which "classification" of the patented products was discussed. Brief on behalf of the defendants, Line Material Company and Southern States Equipment Corporation, Civil Action No. 1696 (D.C. Wis., 1946), 83-86.

[19] United States v. Line Material Co., 64 F. Supp. 970, 974 (Wis., 1946).

[20] It is true that in the General Electric case the Government argued that the patentee did bind itself to sell at fixed prices. Brief for the United States, United States v. General Electric Co., No. 113 (U.S., October Term, 1926), 88. But the question was not discussed by the Court and the situation was treated as one in which the patentee had freedom to sell at any price it chose. One commentator has argued that price limitations binding the licensee are not justifiable as within the scope of the patent grant but are made necessary by economic considerations. See Wood, op. cit. supra, note 3, at 48 n. 51.

[21] "Owners of competing patents do not need cross-licensing, but manufacturers of complementary patents must have cross-licensing if the public is to have the benefit of the cheaper device covered by the subservient patent." United States v. Line Material Co., 64 F. Supp 970, 975 (Wis., 1946).

proposition seems irrelevant to the question of price-fixing. Owners of complementary patents may cross-license one another with or without royalties. But there is no reason for the court's assumption that the existence of complementary patents justifies their going outside the orbit of the cross-license and sublicensing so as to fix prices among their competitors.

The Government, while insisting that the *General Electric* doctrine is "plainly wrong in principle," was not willing to rest its argument upon the supposedly erroneous conclusion in that case.[22] The Government asserted that the present case is within the doctrine of *United States v. Masonite Corp.*[23] Masonite, patentee of a product known as "hardboard," executed agreements with its principal competitors constituting them *del credere* agents for the sale of hardboard at prices fixed by Masonite in sales to its own customers. The Supreme Court held that the agreements violated the Sherman Act. In the present case the Government argued that the "sub-licensees" were like the "agents" in the *Masonite* case, and that the escrow device was used in both cases to achieve concert of action among competitors through supposedly independent agreements.[24] There is room for speculation as to exactly what the *Masonite* case did decide. The Court specifically assumed that ". . . . the agreements constituted the appellees as *del credere* agents of Masonite."[25] If that premise is accepted the Court seems to have advanced the proposition that there are circumstances under which a patentee-manufacturer cannot legally fix the price of the *first* sale of his product. But there is reason to doubt that the Court took the so-called "agencies" seriously.[26] It cannot be said that the *Masonite* case overruled the *General Electric* doctrine since the Court expressly declined to pass on the

[22] Because of its belief that the General Electric case was wrong in principle the Government was faced with a dilemma: if the Government based its case on the proposition that the General Electric decision should be overruled, it faced the danger that that decision would be reaffirmed by the Supreme Court; yet to argue solely on the basis of United States v. Masonite Corp., 316 U.S. 265 (1942), would involve a risk that the present case might result in a decision favorable to the Government and yet leave the General Electric doctrine unimpaired.

[23] 316 U.S. 265 (1942).

[24] It is of interest to observe that the Bement case, upon which the General Electric decision was principally based, involved escrow agreements similar to those used in the present case. In that case the Court said, "It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit. . . . . But there is no finding by the referee that such contracts were in fact entered into by those other parties. . . . . If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination." Bement v. National Harrow Co., 186 U.S. 70, 94 (1901).

[25] United States v. Masonite Corp. 316 U.S. 265, 277 (1942).

[26] It is perhaps significant that Mr. Justice Douglas, after acknowledging the validity of the del credere agencies, continues to refer to the "agents" in quotation marks. And he says, "So far as the Sherman Act is concerned the result must not turn on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade." Ibid., at 280.

right of a patentee to set the price at which a manufacturer-licensee can sell.[27] But the *Masonite* principle—that in passing upon a program to fix prices among competitors by agreements under a patent grant the Court will not be influenced by the particular legal form which the scheme embraces—seems to have severely limited the *General Electric* doctrine and placed it in need of re-examination.

Should the *Line* case be appealed to the Supreme Court, the Court may do one of several things. It may affirm the lower court in which case it would appear that the doctrine of the *General Electric* case has been extended to permit price-fixing by competitors throughout an industry. It may reverse the lower court on the ground that the present situation is an extension of the *General Electric* case and illegal under the *Masonite* decision. It is arguable that this result would eliminate many of the evils of large scale price-fixing and still protect the small manufacturer who owns a valuable patent and is reluctant to license his large competitor for fear that his licensee, through greater resources and mass-production methods, will drive the patentee out of business by underselling him.

The Court may overrule the *General Electric* case.[28] That decision will quite reasonably answer in the negative the question of whether there is a valid distinction between fixing the price at which patented goods are resold and fixing the price at which a licensee-manufacturer sells patented products.[29] By the first arrangement the patentee sells the patented product and thereby receives the entire remuneration to which his patent entitles him.[30] In the case of a license to manufacture and vend the patentee transfers an intangible right, i.e., the right to manufacture and vend, and his remuneration is in the payment of royalties by the licensee. Furthermore, the right to price-fix in the simple situation envisaged by Mr. Chief Justice Taft is of dubious applicability to modern industrial patent structures[31] as, indeed, it was when the *Bement* and *General Electric* cases were decided.[32] But as long as the *General Electric* doctrine re-

[27] "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problem presented by Bement v. National Harrow Co., 186 U.S. 70, and that part of the General Electric case which dealt with the license to Westinghouse." Ibid., at 277.

[28] It is possible that if the patentee is prohibited from setting the price at which his licensee sells, problems will arise similar to those posed by the "single trader" cases; a patentee-manufacturer faced with the possibility that his licensee may undersell him will chose with care those whom he licenses. Cf. United States v. Colgate & Co., 250 U.S. 300 (1919).

[29] An interesting discussion of that question which seems to have anticipated the situation presented in this case appears in Dominick, Recent Developments in the Law of Price Restrictions in Patent License Agreements, 11 Geo. Wash. L. Rev. 302 (1943). For an expression of the opposing considerations see Wood, op. cit. supra, note 3, at 47.

[30] See note 6, supra.

[31] See Potts v. Coe, 140 F. 2d 470 (App. D.C., 1944).

[32] See note 16, supra.

mains undisturbed, it may induce a belief on the part of the business community that the scope of the patent grant justifies price protection among competitors.[33]

Taxation—Income Tax—Depreciation of Mortgaged Property in Computing Gain or Loss—Basis of Mortgaged Property—[Federal].—The taxpayer was executrix as well as sole devisee and legatee under her husband's will. The husband died in 1932 leaving an apartment building and land, subject to a mortgage of $262,042.50.[1] Valuation for Federal Estate Tax purposes was $262,042.50, thus the taxpayer's equity was zero. She never was liable personally on the mortgage debt.[2] Full depreciation deductions for tax purposes were claimed and allowed on the property.[3] In 1938, to avoid foreclosure, the taxpayer conveyed the property, subject to the mortgage[4] and past due taxes, for $3,000. Sales expenses were $500. The taxpayer reported $2,500 as a capital gain in 1938, including half that amount as taxable income.[5] The Commissioner of Internal Revenue assessed a deficiency of $1,932.99 contending that the taxpayer sustained a capital loss of $528.85 upon sale of the land and an ordinary gain of $24,031.45 on the apartment building. The taxpayer's position was sustained by the Tax Court of the United States.[6] On appeal to the circuit

[33] Although the General Electric decision is clearly in need of re-examination, the present case is a difficult one in which to challenge the validity of the doctrine of that case. The presence of complementary patents suggests a superficial distinction between the principal case and the General Electric case with respect to price-fixing. On the other hand, the evidence of joint action by the licensees in the principal case suggests a combination going beyond the doctrine of the General Electric case. The validity of the General Electric decision will be raised squarely in a suit by the Government against the General Electric Company now being argued in the District Court for the District of New Jersey (Civil Actions, numbers 1364 and 2590). It appears improbable that that case will reach the Supreme Court before the Line Material case.

[1] The mortgage lien consisted of $255,000 principal and $7,042.50 accrued interest.

[2] In New York an heir or devisee does not assume personally a mortgage debt solely by inheriting title to mortgaged property. Hauselt v. Patterson, 124 N.Y. 349, 26 N.E. 937 (1891); Levy v. Comfort, 13 N.Y.S. 2d 845 (1939), aff'd 257 App. Div. 1037, 13 N.Y.S. 2d 847 (1939).

[3] The taxpayer operated the property under an agreement with the mortgagee acting as executrix for the estate from 1932 through 1936 and in her individual capacity as titleholder in 1937 and 1938. The entire net income, after taxes and operating expenses, was applied on interest. Income tax returns for the estate from 1932 through 1936 included rentals as gross income; taxes, operating expenses, interest payment, and depreciation as deductions. Similar gross income and deductions were reported in the taxpayer's personal returns during 1937 and 1938. The net effect of the gross income report and deductions, other than depreciation, was zero. Taxes, operating expenses and interest paid were deductible in full. Revenue Act of 1938, § 23(a)(1), (b), (c), 52 Stat. 460 (1938), 26 U.S.C.A. § 23(a)(1), (b), (c) (1940). Thus, except for the amount claimed for depreciations, no increase or reduction in taxes or taxable income resulted. For a discussion of the depreciation deduction, see notes 13 and 33, infra.

[4] The purchaser assumed a mortgage principal of $255,000, interest due of $15,857.71, and taxes of undetermined amount assessed for the second half of 1938.

[5] Revenue Act of 1938, § 117(b), 52 Stat. 501 (1938), 26 U.S.C.A. § 117(b) (1940).

[6] Beulah B. Crane, 3 T.C. 585 (1944). The Tax Court of the United States determined that gain realized on the sale of the building was ordinary, not capital, gain. Capital gain was re-

court of appeals, *held*, the position of the Commissioner was correct. Order reversed, one judge dissenting. *Com'r v. Crane.*[7]

The income tax system is based upon the assumption that property does not fluctuate in value during the period it is held by any one person.[8] Consequently, basis and depreciation are figured upon a constant valuation. To compensate for the inaccuracy of this assumption, the tax law provides for an adjustment when property is sold. This adjustment appears as a capital gain, loss, or, in the case of an unfortunate mortgagee, as a bad debt deduction.[9] Depreciation deductions are allowed in order to compensate for capital loss due to wear and tear with the passage of time.[10] Each year a minimum deduction must be taken on depreciable property by the person entitled to the depreciation.[11] The aim of the tax system is to approximate as closely as possible the actual yearly loss due to depreciation so that gain or loss represents only value fluctuation occurring since acquisition of the property. To the extent that the approximation is inaccurate, either a positive or a negative depreciation allowance is hidden in the gain or loss adjustments.

Two solutions for the instant case were afforded by the courts. The tax court treated the taxpayer as receiving an equity of zero; consequently her basis was zero. Since depreciation is computed as a percentage of the basis, the depreciation was zero, and therefore the adjusted basis was also zero.[12] The gain on the

---

ceived on the land. Revenue Act of 1938, § 117(a)(1), 52 Stat. 500 (1938), 26 U.S.C.A. § 117(a)(1) (1940). This point was not in issue before the circuit court. A deficiency of $27.77 was assessed by the Tax Court on its finding. Otherwise the taxpayer's position was supported. Brief of the Petitioner, at 32, Beulah B. Crane, 3 T.C. 585 (1944).

[7] 153 F. 2d 504 (C.C.A. 2d, 1945), cert. granted 66 Sup. Ct. 980 (1946).

[8] ". . . . appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property." Treas. Reg. 101, art. 41–2, 4 Fed. Reg. 675 (1939), Code Fed. Reg., tit. 26 § 9.41–2 (Supp. 1939); Mertens, Law of Federal Income Taxation § 5.05 (1942).

[9] Treas. Reg. 101, art. 23 (k)-3, 4 Fed. Reg. 645 (1939), Code Fed. Reg., tit. 26 § 9.23 (k)-3 (Supp., 1939); IT 3548, CB 1942–1, pp. 74, 158, modifying IT 3121, CB 1937–2, p. 138, and revoking IT 3167, CB 1938–1, p. 190.

[10] Revenue Act of 1938, § 23(l), 52 Stat. 462 (1938); Treas. Reg. 101, art. 23(l)-1, (l)-2, (l)-4, 4 Fed. Reg. 645 (1939), Code Fed. Reg. tit. 26 § 9.23(l)-1, (l)-2, (l)-4 (Supp., 1939); see Detroit Edison Co. v. Com'r, 319 U.S. 98, 101 (1943); United States v. Ludey, 274 U.S. 295, 300 (1927).

[11] Revenue Act of 1938, § 113(b)(1) (B), 52 Stat. 494 (1938), 26 U.S.C.A. § 113(b)(1) (B) (1940). Under this section, adjusted basis for determining gain or loss on a sale is found by including at least the minimum depreciation that could have been taken, regardless of whether the taxpayer actually did take depreciation in prior years. United States v. Ludey, 274 U.S. 295 (1927); Beckridge Corp., 45 B.T.A. 131 (1941), aff'd Beckridge Corp. v. Com'r, 129 F. 2d 318 (C.C.A. 2d, 1942); Kittredge v. Com'r, 88 F. 2d 632 (C.C.A. 2d, 1937); Treas. Reg. 101, art. 113(b)-1, 4 Fed. Reg. 723 (1939), Code Fed. Reg. tit. 26 § 9.113(b)-1 (Supp., 1939).

[12] In the sale of assets, adjusted basis is the basis of the property at the time it was received by the seller, less depreciation. Revenue Act of 1938, §§ 113(b)(1) (B), 113(a)(5), 52 Stat. 490 (1938), 26 U.S.C.A. §§ 113(b)(1) (B), 113(a)(5) (1940). Depreciation is figured on the full value of the property. Revenue Act of 1938, §§ 114(a), 113(b), 113(a), 52 Stat. 494 (1938),

sale was $2,500, the net sale price less the basis.[13] If a zero basis is assumed, the tax problem is relatively simple,[14] for the conclusion that the depreciation must be zero automatically follows. Since the taxpayer was not personally liable on

---

26 U.S.C.A. §§ 114(a), 113(b), 113(a) (1940). Amount realized is the money and property received in return for the asset. Revenue Act of 1938, § 111(b), 52 Stat. 484 (1938), 26 U.S.C.A. §111(b) (1940). The gain or loss is the difference between the adjusted basis and the amount realized on the sale of the asset. Revenue Act of 1938, § 111(a), 52 Stat. 484 (1938), 26 U.S.C.A. § 111(a) (1940).

[13] Regardless of whether the taxpayer was entitled to claim depreciation, she had in fact made such claims and they had been allowed. A doctrine of estoppel has developed as a result of the statute of limitations which prohibits the reopening of a tax return after three years. The Commissioner is barred from assessing any tax or enforcing collection of any tax not assessed after three years from the date of filing a return. Revenue Act of 1938, § 275(a), 52 Stat. 539 (1938), 26 U.S.C.A. § 275(a) (1940). A similar time limit is provided for claims by the taxpayer for return of overpayments. Revenue Act of 1938, § 322(b)(1), 52 Stat. 545 (1938), 26 U.S.C.A. § 322(b)(1) (1940). No representation as to fact, taken in a return that is barred from change, can later be repudiated or inconsistently asserted. Alamo National Bank v. Com'r, 95 F. 2d 622 (C.C.A. 5th, 1938), cert. den. 304 U.S. 577 (1938), rehearing den. 304 U.S. 590 (1938); see Wichita Coca Cola Bottling Co. v. United States, 152 F. 2d 6, 8 (C.C.A. 5th, 1945); Portland Oil Co. v. Com'r, 109 F. 2d 479, 486 (C.C.A. 1st, 1940), cert. den. 310 U.S. 650 (1940); Karol, The Doctrine of Estoppel, 23 Taxes 1132 (1945). Inconsistent positions as to law, however, are permitted. Com'r v. Saltonstall, 124 F. 2d 110 (C.C.A. 1st, 1941); Helvering v. Schine Chain Theaters, 121 F. 2d 948 (C.C.A. 2d, 1941); Helvering v. Williams, 97 F. 2d 810 (C.C.A. 8th, 1938); Karol, op. cit. supra. Questions concerning prior claims and allowances of depreciation are said to be questions of law. Com'r v. Saltonstall, 124 F. 2d 110 (C.C.A. 1st, 1941); see East Bay Water Co. v. McLaughlin, 24 F. Supp. 222, 227 (Cal., 1938), app. dismissed, 104 F. 2d 1016 (C.C.A. 9th, 1939); Hartford-Empire Co. v. Com'r, 137 F. 2d 540, 541 (C.C.A. 2d, 1943), cert. den. 320 U.S. 787 (1943). Nevertheless, the circuit court intimates that estoppel should lie: "[The mortgagor] should be compelled to take the transaction as a whole, including such past advantages . . . . as allowances for depreciation." Com'r v. Crane, 153 F. 2d 504, 506 (C.C.A. 2d, 1945). Such reasoning places every taxpayer on the horns of a dilemma. If depreciation is claimed and allowed, it must be included in gain or loss computations regardless of whether in fact it should have been allowed. But if depreciation is not claimed, and later determination is that it should have been claimed, it again must be included in gain or loss computations. No matter which he chooses, the taxpayer must risk losing if his guess is wrong. In the instant case, depreciation claimed and allowed totaled $25,500 over eight years while the sum deducted by the Commissioner for depreciation allowable was $28,045.10. Beulah B. Crane, 3 T.C. 585, 587 (1944). The circuit court was not even consistent with its estoppel theory when it failed to limit the depreciation computation to the amount actually deducted.

[14] It might be argued that the tax court opinion introduces a rule that the correct basis for depreciation is the owner's equity, not the full value of the property. Com'r v. Crane, 153 F. 2d 504, 505 (C.C.A. 2d, 1945); see also Brief for the Petitioner, at 15. The result of such a rule would be administrative chaos. If the distinction between real and book equity were ignored it would force recognition of gain or loss resulting from each fluctuation in property value. Such a result would be contrary to basic premises of the present tax system. See note 8, supra. Furthermore, such a rule would ignore the fact that some one person always bears the full economic loss of depreciation. That person is the mortgagor so long as he holds a positive equity; otherwise it is the mortgagee or the personal debtor. If this is a proper construction of the tax court's opinion, indications are that the rule will not be extended since the value of a mortgage lien should be excluded from the computation of gain "only when the facts are so peculiar that the mortgage neither constitutes a liability of the seller nor is responsible for a part of the aggregate benefit received." Anna I. Hilpert, 4 T.C. 473, 476 (1944), reversed on appeal because the facts brought the case within the doctrine stated, which was expresaly approved. Hilpert v. Com'r, 151 F. 2d 929 (C.C.A. 5th, 1945).

the mortgage debt, no difficulty arises in excluding the mortgage from the amount realized.[15] The circuit court found that the taxpayer's basis was the valuation of the entire property, $262,042.50, since she was the titleholder.[16] Depreciation was computed as a percentage of that basis and amounted to $28,045.10. The gain on the sale was sale price plus mortgage lien less adjusted basis.[17] Both of the above solutions proceeded upon the assumption that the

[15] Release from personal liability constitutes receipt of property other than money. Helvering v. American Chicle Co., 291 U.S. 426 (1934); United States v. Kirby, 284 U.S. 1 (1931); Com'r v. Green, 126 F. 2d 70 (C.C.A. 3rd, 1942). The release operates as payment of the debt. Although to protect her equity the taxpayer in the instant case had to pay interest, and to remove the lien she had to pay the principal, she was not personally liable to make either payment. N.Y. Real Property Law (McKinney, 1945) § 250. A later amendment did not affect this provision of the statute. N.Y.L. 1937, c. 75; Report of the N.Y. Law Revision Com'n 960 (1937). See note 2, supra. Sale of the property subject to a mortgage did not release the taxpayer from any liability; she had no liability to be released so could not receive property in the form of such a release. In the instant case all the purchaser from the taxpayer could acquire was an equity of redemption. His cost basis was $3,000. As the purchaser paid the mortgage, his basis would increase along with a corresponding increase in his property interest. The situation was analogous to the sale of an option to purchase. For $3,000 the taxpayer sold her right to redeem the property. She sold no more because she owned nothing more than a right to redeem. Cf. Hotel Astoria, Inc., 42 B.T.A. 759 (1940); Fulton Gold Corp., 31 B.T.A. 519 (1934); Com'r v. Hoffman, 117 F. 2d 987 (C.C.A. 2d, 1941); Polin v. Com'r, 114 F. 2d 174 (C.C.A. 3rd, 1940). In reaching the opposite conclusion, the Circuit Court of Appeals invoked a doctrine of constructive receipt. "When .... the mortgagor makes an allowance to the vendee of the amount of the lien, he secures a release from a charge upon his property quite as though the vendee had paid him the full price on condition that before he took title the lien should be cleared." Com'r v. Crane, 153 F. 2d 504, 506 (C.C.A. 2d, 1945). This statement illustrates a fallacy in the court's reasoning. If the mortgagor paid all or part of the mortgage debt she would, in effect, be buying that portion of the property. Cf. Hotel Astoria, Inc., 42 B.T.A. 759, 762 (1940). Payments would not reduce any personal liability since she has no liability to be reduced. The greater the debt payment, the greater her interest in the property, just as the greater any purchaser's payments the greater his interest. If the mortgagor paid $255,000 on the mortgage and immediately sold her interest for $255,000, no gain should result. It would be strange if ownership of the property free of the mortgage for a month, a week, or even a minute, could result in eight years' depreciation of the property, yet that is the result reached by the court. The court also dwells upon the point that the transaction between the taxpayer and the purchaser was a sale. Com'r v. Crane, 153 F. 2d 504, 506 (C.C.A. 2d, 1945). This was not in issue. Both parties conceded that a sale was involved.

[16] For a discussion supporting the opinion of the Circuit Court of Appeals in the instant case, see 46 Col. L. Rev. 486 (1946).

[17] The Commissioner's computations were as follows:

			Land	Building
Selling price			$54,471.15	$203,028.85
Cost or basis:				
Land			55,000.00	
Building		$207,042.50		
Less depreciation at				
2% on $207,042.50:				
1937	$24,845.10			
1938 (claimed and allowed)	3,200.00			
		28,045.10	.....	178,997.40
		Loss....	$ 528.85	Gain...$ 24,031.45
50% of loss allowable			$ 264.42	
100% of gain on sale of a building which is not a capital asset				$24,031.45

Beulah B. Crane, 3 T. C. 585, 587 (1944). No reason appears in the record for including only the mortgage principal in the sale price. The purchaser took title subject to interest payable in addition to mortgage principal. Note 4, supra.

mortgagor was the person entitled to take depreciation and left as the sole problem the computation of the gain. It is submitted that one important question brought forth by the principal case is the determination of *who* is entitled to take depreciation under these circumstances. Within the limitations of administrative feasibility, the aim of the tax system is to impose tax liability upon the person who has actually received the benefit of property ownership, and to allow deductions to the person who has suffered the loss from depreciation. A more consistent approach, therefore, would be to permit the mortgagor to take depreciation deductions until his positive book equity is reduced to zero, and then to permit no one to take depreciation.[18] The application of this rule to the instant case suggests a third solution: Basis was $262,042.50 with depreciation computed upon the full basis. But since the taxpayer never had a positive book equity, she was not entitled to depreciation deductions nor should she be charged with such in gain computations. With depreciation not chargeable, the basis equaled the adjusted basis and the gain on the sale was $2,500.

Normally the person entitled to claim depreciation deductions is the titleholder, hence the mortgagor is allowed such claims.[19] But the ultimate test of the right to deduct depreciation is economic loss suffered.[20] Depreciation will not be allowed a person who has not paid or assumed the cost of the property.[21] Thus,

[18] Where the mortgagor's equity is zero, depreciation will cause a loss to the mortgagee, if property values do not fluctuate. Although logically the mortgagee should be permitted depreciation deductions, under these circumstances, a claim for depreciation by one other than the titleholder would introduce serious administrative difficulties.

[19] Under both the lien and title theories of mortgages today, the mortgagor usually is the beneficial owner; the mortgagee is a preferred and secured creditor. 1 Glenn, Mortgages 36 (1943); 1 Jones, Mortgages §§ 18, 67 (8th ed., 1928). New York is a lien theory state. Ibid., at § 48. The person receiving benefit from property is the owner for tax purposes; see Doll v. Com'r, 149 F. 2d 239, 243 (C.C.A. 8th, 1945), cert. den. 66 Sup. Ct. 30 (1945). But see Corliss v. Bowers, 281 U.S. 376 (1930), where the court held that income under the control of a taxpayer was taxable to him even though benefit of the income was given voluntarily to another. The instant case differs since the mortgagor was not free to control the rentals until she acquired some positive equity. All net income was paid to the mortgagee under an agreement. Thus the Crane case presents the exception to the rule that mortgagors as beneficial owners are entitled to depreciation. The taxpayer was a mortgagor but she was not a beneficial owner.

[20] " 'Depreciation' . . . . is not predicated upon ownership of the property, but rather upon an investment in property which is thereafter used. The important question is not, in whom vests the fee or when it vested, but who made the investment . . . . which is to be recovered. . . . . The one who made the investment is entitled to its return." Gladding Dry Goods Co., 2 B.T.A. 336, 338 (1925); cf. Weiss v. Weiner, 279 U.S. 333 (1929); Detroit Edison Co. v. Com'r, 319 U.S. 98 (1943); Tunnel R. of St. Louis v. Com'r, 61 F. 2d 166, 174 (C.C.A. 8th, 1932), cert. den. 288 U.S. 604 (1933), rehearing den. 288 U.S. 607 (1933).

[21] Detroit Edison Co. v. Com'r, 319 U.S. 98, 102 (1943) (company cannot claim depreciation since customers paid the cost of equipment); Reisinger v. Com'r, 144 F. 2d 475 (C.C.A. 2d, 1944) (lessor denied depreciation when lessee paid the cost); Bonwit Teller, Inc. v. Com'r, 136 F. 2d 978 (C.C.A. 2d, 1943), cert. den. 320 U.S. 794 (1943) (new lessor denied depreciation on improvements made by old lessor).

at times the titleholder cannot take such a deduction,[22] one other than the titleholder may take it,[23] or perhaps no one at all is entitled to it.[24]

Three basic mortgage situations involving depreciation can occur. (1) The taxpayer has a positive book equity when the property is acquired. (2) The taxpayer has a zero or negative book equity at time of acquisition. (3) The taxpayer has a positive book equity to start, then mortgages his property to a greater value than this original equity.

(1) The circuit court's rationale and the suggested approach both permit the mortgagor to claim full depreciation in the normal case where he possesses a positive book equity. All economic loss due to depreciation is borne by the mortgagor. As the property depreciates, his equity becomes smaller; the mortgage debt remains constant. But depreciation deductions or unpaid interest may extinguish the book equity. At this point the two approaches differ. Economic loss no longer is borne by the mortgagor, but continued depreciation adds to the burden of the personal debtor as a potentially increased deficiency judgment, or to the mortgagee if no deficiency judgment is recoverable. The closest assumption to reality permitted by the non-fluctuation limitations of the tax system is that after a mortgagor's equity is gone, surrender of the property will eventually follow.[25] If the property is surrendered rather than sold, the mortgagor will not suffer a taxable gain.[26] If the mortgagor is permitted to continue

[22] Cf. Georgia R. & Electric Co. v. Com'r, 77 F. 2d 897 (C.C.A. 5th, 1935), cert. den. 296 U.S. 601 (1935); Gladding Dry Goods Co., 2 B.T.A. 336, 338 (1925). But cf. Helvering v. Terminal R. Ass'n of St. Louis, 89 F. 2d 739, 742 (C.C.A. 8th, 1937).

[23] Cf. Helvering v. F. & R. Lazarus & Co., 308 U.S. 252, 254 (1939); Cogar v. Com'r, 44 F. 2d 554 (C.C.A. 6th, 1930).

[24] Cf. Atlantic Coast Line R. Co. v. Com'r, 81 F. 2d 309 (C.C.A. 4th, 1936), cert. den. 298 U.S. 656 (1935), rehearing den. 298 U.S. 691 (1936); N.Y. Central R. Co. v. Com'r, 79 F. 2d 247 (C.C.A. 2d, 1935), cert. den. 296 U.S. 653 (1935). But cf. Alaska Realty Co. v. Com'r, 141 F. 2d 675, 678 (C.C.A. 6th, 1944).

[25] Depreciation can cause economic loss only when it reduces the value of a property interest. The most realistic approach would allow a mortgagor to claim depreciation only when the property value actually exceeded the total mortgage lien. But such an approach would be administratively impossible, requiring recognition of each temporary fluctuation in realty value. Accepting the assumption that property values do not fluctuate, the most realistic approach possible is to consider that a mortgagor with a positive book equity will eventually redeem the property, therefore the ultimate depreciation loss will fall on him. Conversely a mortgagor with zero or negative equity will eventually give up his property through surrender or foreclosure since payment of the mortgage lien would involve a greater sum than the property is worth. These assumptions could prove erroneous only when relatively large value fluctuations occur contrary to the basic non-fluctuation assumption. Discrepancy between reality and the above assumptions would be adjusted in the gain, loss, and bad debt computations when the property is sold or transferred just as such adjustments are made under the circuit court solution. But the suggested solution would decrease the adjustments necessary since it more closely approaches economic reality than does an assumption that a mortgagor is owner for all purposes.

[26] See Com'r v. Green, 126 F. 2d 70, 72 (C.C.A. 3rd, 1942); Stokes v. Com'r, 124 F. 2d 335, 337 (C.C.A. 3rd, 1941); Polin v. Com'r, 114 F. 2d 174, 176 (C.C.A. 3rd, 1940). A dictum in the

to claim depreciation deductions, when surrender is made he will have received undeserved tax deductions.[27] Far from being an unusual occurrence this windfall is granted the mortgagor under the circuit court solution every time that a mortgage is surrendered. In effect, a second depreciation deduction upon the same property is granted, when the mortgagee's bad debt deduction is allowed. To the extent that depreciation actually has decreased the property value, the mortgagee's bad debt deduction will be increased. Under the suggested procedure, the mortgagor would not be allowed depreciation after book equity is extinguished, nor would he receive a tax windfall. The economic loss would be reflected as it should be in the bad debt deduction taken by the mortgagee.[28]

(2) Where the original book equity is zero, the circuit court solution would allow depreciation and would include it in gain computation charged to the mortgagor. This result is inconsistent with any assumption that property values do not fluctuate, since the mortgagor could suffer economic loss due to depreciation only when the property actually appreciated in relation to its book value. If, instead of surrender, the property were foreclosed and sold at judicial sale, this solution would charge the mortgagor with a tax gain even though he might never have received a cent upon the property.[29] An identical tax charge would occur if the property had been sold for cash with the mortgage payable out of the proceeds.[30] This result is avoided when no depreciation is allowed to a per-

---

instant case indicates a similar conclusion. Com'r v. Crane, 153 F. 2d 504, 506 (C.C.A. 2d, 1945). Doubts concerning the rule that surrender of mortgaged property will avoid taxable gain have been expressed. 26 Col. L. Rev. 486 (1946). The desirability of the rule also has been questioned. Braunfeld, "Subject to a Mortgage," 24 Taxes 424, 435-42 (1946). Both discussions appear to be concerned with the double deduction problem. But the solution to this problem lies in denial of depreciation deductions to persons not suffering economic loss, not in forced inclusion of previous depreciation deductions in gain computations, particularly when such deductions frequently have been "allowable" rather than actually "allowed."

[27] When the property is surrendered the mortgagee has no taxable gain so is never held accountable for the depreciation deduction taken. Only in the unusual cases, when a mortgagor with a zero or negative equity eventually clears his property, is the circuit court solution closer to reality. Then the suggested theory is less accurate since it grants the mortgagor depreciation in one lump sum. But this is no worse than recognizing the depreciation at one time in the bad debt deduction of the mortgagee at foreclosure or surrender. After the mortgagor has lost his book equity the chances of surrender are greater, according to the non-fluctuation assumption, than the chances that the mortgage will be paid. The inaccuracy in this latter case is a burden the tax system should bear if it insists upon a non-fluctuation theory.

[28] Inability of the mortgagor to claim depreciation over a period of years because of a zero equity would not enable the mortgagee to claim increased depreciation for the remainder of the life of the property. To the extent that actual depreciation has caused a property loss, compensation for that loss will be hidden in the mortgagee's bad debt deduction. But upon surrender or purchase at a foreclosure sale, the mortgagee acquires the property at a new basis and subsequent depreciation will be computed on that new basis. See note 9, supra.

[29] Helvering v. Hammel, 311 U.S. 504 (1941).

[30] A slight change in the facts of the Crane case illustrate this point. Suppose that Mrs. Crane had sold her interest for $272,000 cash, the mortgage to be paid out of that sum. Gain on the sale would be computed at $28,000 depreciation plus $10,000 gain over original basis of $262,000, a total taxable gain of $38,000. Yet Mrs. Crane would not receive one penny of the

son who does not have a book equity. The only undesirable result under the suggested solution would occur if the mortgage were suddenly paid. The mortgagor would in effect be allowed depreciation in one lump sum by virtue of the recognized gain on sale.[31] But this effect would be negligible for when the mortgage is paid off in installments, depreciation would be chargable as soon as a positive book equity appeared.

(3) Where the mortgagor acquired a positive book equity, and then mortgaged to an extent greater than his book equity, the circuit court opinion would still permit the mortgagor, as titleholder, to collect depreciation deductions.[32] Thus, the mortgagor could take tax deductions while avoiding any ultimate accountability for such deductions by surrendering the property to the mortgagee. This situation should not present any problems not already met in the first two cases.[33]

$272,000. The $15,000 interest due would more than absorb the extra $10,000 received. She would still owe taxes on a "gain" of $38,000. Such an event would seem highly fictitious, yet the circuit court states that this would be the result. Com'r v. Crane, 153 F. 2d 504, 506 (C.C.A. 2d, 1945). It is arguable that the above results are solely a result of holding property on a shoestring. Holding property on a shoestring is gambling and gambling is bad. Results like those above, and like those in the Crane case itself are desirable since they discourage gambling. But is this argument valid? If the mortgagor is not permitted to claim depreciation unless he has a positive equity, the government is not harmed by continued unearned depreciation deductions. Upon surrender or foreclosure the mortgagor will receive actual depreciation compensation in his bad debt deduction, but that is true under either theory. If the property appreciates in value then the government benefits, both by collecting taxes upon the mortgagor's actual gain and also by avoiding an allowance to the mortgagee for a bad debt deduction. If the mortgagor's shoestring operation fails, the government loses equally under either theory.

[31] Payment of a mortgage will be rare after the mortgagor ceases to have a positive book equity. See note 25 supra. The alternative is to continue to grant a mortgagor depreciation deduction even though it has long since become clear that the outcome will be either eventual surrender or foreclosure.

[32] This situation normally can occur only when fluctuation makes the actual property value greatly in excess of book value or basis. The suggested rule would stop depreciation deductions as soon as the book equity is extinguished. In extreme cases this would obviously be unjustified since the chance of the mortgage being paid would be great. The mortgagor would be the person who bore actual depreciation loss. But the flaw in the suggested solution here is the flaw common to the entire tax system. Any assumption that property values do not fluctuate is quite erroneous. The error becomes material when large fluctuations do occur. Unless some administratively feasible method appears by which value fluctuations can be recognized as they occur, the flaw seems uncorrectable. To some extent, the tax loss to the government through allowing depreciation to appear in a lump sum would be offset by the large taxable gain which must inevitably result when this situation occurs.

[33] At first glance it might seem that skilful manipulation through successively incurring and removing mortgages would permit tax profiteering under the suggested solution. Such profiteering would be obtained by taking depreciation at an accelerated rate during the years the property was unencumbered. This scheme would hardly be feasible. Depreciation deductions are disallowed during years of negative equity under the assumption that the property will not be redeemed. This disallowance does not deny the fact that depreciation is occurring at a given rate; it is based on the inability of the tax system to determine who should be allowed the deduction. If the non-redemption assumption proves false, hindsight will show that deductions should be allowed the mortgagor. The statute of limitations bars the reopening of past returns

When the mortgagor possesses a positive equity he should be allowed depreciation deductions and he should be charged for depreciation in gain computation. Generally the mortgagor eventually will redeem the property, and the economic loss caused by depreciation is suffered by him. But where the mortgagor has a zero equity, he will not, in most cases, redeem the property; thus the economic loss of depreciation will not fall upon him. Since the economic loss will not be suffered by the mortgagor, he should not be permitted tax deductions for that loss.

The circuit court makes no attempt to approximate economic reality within the limitations of the tax system. It grants depreciation to every mortgagor and charges him with such deductions in gain computations regardless of the actual economic interest possessed by the mortgagor. This approach to the problem gives harsh results in unusual situations such as the instant case.[24] Such harshness is not necessary in order to attain a workable tax system. Limiting depreciation deductions by mortgagors to situations where they have a positive book equity would more closely approximate reality. It would grant depreciation to those who suffer economic loss due to depreciation, and deny it to those who do not. It would tax those who receive an actual gain on a sale but eliminate theoretical gain where none actually has been received.

Torts—Manufacturer's Liability—Intervening Negligence—[Tennessee].—The plaintiff, driving an automobile as a guest of the owner, was injured in an accident which resulted when a defective hood catch allowed the hood to fly up and block the driver's vision. The car in question had been through a number of sales—from the defendant manufacturer to the local dealer, then to one of its salesmen for use as a demonstrator, and, after he was no longer employed by the dealer, to the present owner. After the first cars of this model had been put on the market, the defendant discovered that each car had a defective catch on the hood. To remedy this the defendant distributed auxiliary catches to all

---

for more than a three-year period. See note 13, supra. To the extent that reopening of past returns is permitted, such returns will be reopened and depreciation deductions granted. This reopening of returns is quite desirable since it results in depreciation being taken by the persons that hindsight shows should be permitted to do so. Where the statute of limitations would bar reopening of returns, depreciation not allowed will have to be included in final gain computations. There would be little reason for the individual taxpayer to deliberately mortgage his property in order to defer depreciation deductions. Interest charges on the mortgage would more than counterbalance any tax advantage to be achieved.

[24] It is recognized that since Mrs. Crane received depreciation deductions, the suggested solution permits a double depreciation allowance. But this double deduction is permitted only because the statute of limitations prohibits reopening of past tax returns. See note 13, supra. The impossibility of reopening past tax returns should not determine the applicability of a plan designed to avoid such difficulty in future cases. One possible legislative solution of the double deduction problem would be extension of the present ability to reopen past tax returns to cover erroneous depreciation deductions. See Revenue Act of 1938, § 820, 52 Stat. 581 (1938), 26 U.S.C.A. § 3801 (1940).

dealers with instructions to attach them to all cars as a precautionary measure. At that time the car in question was owned by the salesman who, believing the catch to be unnecessary, failed to have it attached to the car. In the plaintiff's action against the defendant manufacturer for negligence, the trial court refused to let the question of the manufacturer's negligence go to the jury; the intermediate appellate court reversed this decision. On appeal to the Supreme Court of Tennessee, *held*, that the intervention of the salesman's act, which was independent, efficient, conscious, and not to be anticipated, destroyed the causal connection between the defendant's negligence and the accident and thus relieved the defendant of liability. *Ford Motor Co. v. Wagoner*.[1]

Since the decision in *MacPherson v. Buick Motor Co.*,[2] manufacturer's liability to either remote vendees or third parties has been extended and expanded.[3] This policy is founded upon the realization that the manufacturer has the means not only to minimize this risk most effectively but also to distribute the burden of the risk to the consumer. Aside from these two considerations, however, the method of analysis and treatment has remained essentially the same as in any simple negligence case—the standard of the reasonably prudent man, the extent of the defendant's duty, and the issue of proximate causation still being the cornerstones of liability. The problem of intervening conduct presented by the instant case lies within the realm of the last of these three issues.

Proximate cause is not merely a question of factual connection between negligent conduct and injury; for liability to ensue there must be a closer relationship between the two.[4] Frequently two consecutive acts have combined to produce the ultimate injury, and the court is forced to decide whether either, both, or neither of the acts involved should imply liability.[5] If the more remote

[1] 192 S.W. 2d 840 (Tenn., 1946).

[2] 217 N.Y. 382, 111 N.E. 1050 (1916).

[3] The MacPherson case established a duty of care to a remote vendee in respect to the manufacture of automobiles which, when defective, involve quite obvious danger to the consumer. Subsequent decisions have extended this duty to the consumer's employees, Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923), to other users of the chattel, Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 195 N.W. 388 (1923), and even to casual bystanders, McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W. 2d 122 (1927). This duty has been found in respect to such apparently innocuous items as a coffee urn, Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E. 2d 415 (1936), a cigarette, De Lape v. Liggett & Meyers Tobacco Co., 25 F. Supp. 1006 (Cal., 1939), aff'd 109 F. 2d 598 (C.C.A. 9th, 1940), or even animal food where there is a risk only to personal property, Ellis. v Lindmark, 177 Minn. 390, 225 N.W. 395 (1929).

[4] Factual cause between the negligence and the injury must be established, of course, but to qualify as the proximate cause much narrower limits have been set. The exact nature of the issues involved is among the most discussed questions in law. See Green, Rationale of Proximate Cause (1927); Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 223, 303 (1911); Gregory, Proximate Cause in Negligence—A Retreat from Rationalization, 6 Univ. Chi. L. Rev. 36 (1938).

[5] In most cases only one of the two actors is before the courts, and thus the court is not required to give a complete answer to the problem. It is usually admitted that the conduct of the more remote actor would make him liable for the injury if it were not for the intervening factor,

actor is to be held not liable, the result is usually stated in terms of proximate cause, and the test is whether the intervening conduct created a new and unforeseeable hazard.[6] This is apparently what the court meant by saying that the intervening conduct was "independent," "efficient," and "not to be anticipated." The relevance of the "consciousness" of the intervening conduct is dubious; it is derived from a line of English cases involving mislabeled poisonous drugs in which the manufacturer's liability was held to be dependent on the lack of knowledge of the intervening vendor that the product was dangerous,[7] and it does not appear to have ever been accepted in this country in those terms. Although the intervening actor's knowledge or lack of it may have a bearing on his negligence in the absence of a duty of inspection, his mere negligence does not of itself relieve the manufacturer of liability, since there is always the possibility of their being joint tortfeasors or even that the intervening actor is not liable. In a number of cases in this country, however, the knowledge of the danger on the part of the intervening actor has been held to relieve the original actor of liability, apparently on the ground that it would not be foreseeable that a subsequent party with knowledge would perpetuate the danger.[8]

In the instant case there is no doubt that the salesman himself was negligent and that, if he had been injured in an accident resulting from the defect, his recovery from the manufacturer would have been barred by his assumption of the risk in refusing to install the safety catch.[9] From this the court concluded that any subsequent vendee should stand in the same position, and that therefore the present suit should be dismissed.[10] The assumption of risk is personal to the salesman, however, and it is difficult to see how he could assume the risk for subsequent vendees, much less for one outside of the chain of title such as the

---

as it was in the instant case for the purpose of appeal, Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 842 (Tenn., 1946), yet it may or may not follow that if the original actor is granted immunity the subsequent party is liable.

[6] Prosser, Torts § 49 (1941); Harper, Torts 251–87 (1933).

[7] 1 Beven, Negligence 42 (4th ed., 1928). These cases are based upon the concept that the act of an intermediate party, while "unconscious" of the risk, is the act of the party setting the risk in motion; if the intermediate dispenser is "conscious" of the danger, and acts negligently in respect to it, he alone should be liable for any subsequent harm.

[8] Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926) (manufacturer had notified all purchasers of limitations in operation of tractor, where third party was injured); Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P. 2d 100 (1936) (plaintiff's employer knew of defective condition of scaffold plank supplied him by defendant). See 21 Minn. L. Rev. 220 (1936).

[9] Assumption of risk is based upon knowledge of the risk involved and the voluntary acceptance of it. Prosser, Torts § 51 (1941).

[10] This may be an over-simplification of the court's position. The statement of the court that "on the same grounds and for like reasons he became a 'conscious' agency, which, intervening, 'destroys, by his negligent act' of omission 'the causal connection between the first person concerned,' Ford Company, 'and the ultimate injury sustained' by the plaintiff herein," may mean that the salesman's act makes him liable, and that his assumption of risk means assumption of liability. Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 845 (Tenn., 1946).

guest driver who was the plaintiff in the instant case. From this point of view subsequent vendees and third parties are in much the same position as an innocent bystander would be if he were struck by the car when it went out of control.

The most persuasive reason for the result in the instant case is that following the original negligence the defendant manufacturer had undertaken to avoid its consequences by precautions which were probably as effective as possible within the range of economic feasibility, and that these precautions were frustrated in this case by the carelessness of a third party. As a general proposition, however, subsequent careful conduct cannot relieve a defendant of the consequences of his original negligence when harm has in fact resulted.[11] If a driver's attention has wandered from the road,[12] or if a landowner carelessly starts a fire on his premises,[13] they are held liable for resulting damage in spite of their subsequent efforts to avoid harm. In the instant case the intervening owner's negligence did no more than to frustrate the defendant's precautions with respect to this particular car; no new hazard was added to that foreseeable from the defendant's original negligence.[14] It might be concluded from this that the original negligence was still the proximate cause of the plaintiff's damage, and that the defendant manufacturer is still liable.

On the other hand it is arguable that if the intervening negligence is not foreseeable the risk is no longer that contained in the original negligence, and that therefore the defendant should be insulated from liability. This would be consistent with the cases which have held that knowledge on the part of the intervening actor relieves the original actor of liability,[15] if it be taken that it is unforeseeable that one with knowledge would not remove the danger. In the instant case, however, and in many other cases, to apply a test of "consciousness" uncritically produces a far from realistic view of foreseeability.[16] It may have been negligent for the salesman not to attach the auxiliary catch, but the defendant is not at liberty to assume that everyone will live up to the standard of the reasonable and prudent man when common observation shows that such is

[11] Rest., Torts § 437 (1934).

[12] Boni v. Goldstein, 276 Mass. 372, 177 N.E. 581 (1931).

[13] Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292 (1905).

[14] There are numerous cases holding that a defendant is still liable, in spite of any type of intervening force, if the ultimate injury is within the scope of the risk created by his original neglect. A striking illustration of this is found in Johnson v. Kosmos Portland Cement Co., 64 F. 2d 193 (C.C.A. 6th, 1933), where the defendant had negligently left a barge filled with an explosive mixture of gas, which was ignited by a stroke of lightning; although the lightning was unforeseeable, the resulting explosion was the foreseeable risk, and thus the defendant was held liable. See also Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 Pac. 53 (1925).

[15] Note 8 supra.

[16] A distinction may be drawn between consciousness of the fact that a poisonous drug is mislabeled and of the fact that a hood catch on a car is defective. The first will almost certainly cause serious harm if passed on, while the latter may or may not work and may or may not cause harm. Whether this distinction is of significance may be a matter of point of view, however.

not the case.[17] Since a more obvious danger would be more likely to be appreciated and remedied by one who knew of the facts which constituted it, the test of foreseeability as applied to cases of subsequent knowledge produces a queer result; the defendant is protected in cases of his more serious negligence and not in cases where others would be more likely to overlook the danger.

It might at first seem harsh to hold the manufacturer of an instrumentality responsible for all reasonably foreseeable consequences actually resulting from his original negligence in releasing a defective product from his control, in spite of subsequent precautions which were rendered ineffective through the carelessness of others, where the person injured is not himself at fault. It might seem absurd in a case where a manufacturer had gone to extreme lengths to remedy the defect, as for instance, by sending a high executive out to plead with the then owner, who still proved stubborn. Yet it must be remembered that the liability of the manufacturer is basically an enterprise liability; for instance, it must always be based on the negligence of an employee who is generally unknown and whose specific conduct is not in evidence.[18] Yet courts at times do not even mention the point and at times find no difficulty in applying res ipsa loquitur.[19] The fact is that it is practically impossible to manufacture articles without some defects creeping in and that this is a necessary incident of mass production. If dangers are to be released on consumers as a necessary result of our system of production it seems only fair that the enterprise should bear the losses resulting from them since it is best able to spread the cost among all consumers, rather than that the loss should be left on the innocent individual who had little reason to anticipate it. The requirement of foreseeability then remains, not so much for the reason that the enterprise might avoid the dangers in the first place, although that is still of some significance, but for the reason that by foreseeing inevitable harm to someone the enterprise is able to insure against it; and the concept of foreseeability becomes that of statistical foreseeability.[20]

Workmen's Compensation—Evidence—Settlement between Third-Party and Employee as Evidence of Negligence in Collateral Suit.—[Illinois].—An employee of the plaintiff construction company was killed while working on a railroad bridge repair project. The deceased's widow brought an action against

[17] "More and more the actual probability is becoming the controlling factor, and less and less attention is paid to what ought as distinguished from what is likely to be done." Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees, 45 L.Q. Rev. 343, 365 (1929).

[18] The evidence of negligence offered in the instant case was merely that the hood catch was defective and that the defendant company had taken precautions to remedy it. Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 841 (Tenn., 1946).

[19] For the extent to which this doctrine is applied see Prosser, Torts § 43 (1941).

[20] For an excellent discussion of the relationship between enterprise liability and proximate cause, see Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 Univ. Chi. L. Rev. 729 (1941).

the railroad, which was not under the Illinois Workmen's Compensation Act, claiming that her husband was an employee of the railroad and had been killed through the negligence of the railroad's agents and servants. To the railroad company's motion to dismiss was attached an affidavit by the plaintiff company stating that the decedent was an employee of the plaintiff and not of the railroad. Subsequently this action was dismissed, the widow receiving a $4,000 settlement from the railroad. Prior to the settlement the widow made an application for compensation from plaintiff under the Illinois Workmen's Compensation Act, and was awarded $4,895 by the Industrial Commission after the settlement had been made. The Commission refused to grant the plaintiff's demand for a $4,000 credit under Section 29[1] of the Act. The circuit court confirmed the decision of the Industrial Commission. On appeal to the Illinois Supreme Court, *held*, the plaintiff was not entitled to have the amount of the settlement credited against its payment to the widow, since the railroad company was not even remotely connected with the accident and hence was not legally liable and since the death was shown to have been caused by the negligence of an employee of the plaintiff. Judgment affirmed. *F. K. Ketler Co. v. Industrial Com'n.*[2]

When an accident has been caused under circumstances creating a legal liability in a third party not under the Act, the Illinois Workmen's Compensation Act, like that in many states, allows an innocent employer who has paid or is liable to pay compensation to the injured employee or his representative, to have his own liability reduced by the amount the injured employee has recovered from the third party, either by way of judgment or settlement. In the event the employee does not pursue his available remedy against the third party, the innocent employer can proceed against the third party and is permitted to indemnify himself out of any moneys recovered for any expense incurred and compensation which has been or will be paid to the injured employee, any excess to be paid over to the employee.[3]

Thus there are two conditions which must be met before the credit feature of the Act is operative; the employer and his employees must be free from negligence and there must be legal liability in a third person not under the Act.[4] The result in the instant case can be supported on the failure of the first condition. The court's treatment of the settlement, however, indicates that, even if the employer had not been negligent, a credit would not have been allowed. How the existence of legal liability in the third party is to be established after a settlement has been made is the troublesome problem presented by this decision.

[1] Ill. Rev. Stat. (1945) c. 48, § 166.

[2] 65 N.E. 2d 359 (Ill., 1946).

[3] Ill. Rev. Stat. (1945) c. 48, § 166.

[4] If the third party is also under the Act, the employee has only one remedy and cannot maintain an action against the third party. The employer, however, can seek indemnification from the third party. Ill. Rev. Stat. (1945) c. 48, § 166.

The problem, never considered directly by the Illinois courts, has typically arisen in two ways in other jurisdictions. (1) The employer, not bound by a settlement to which he has not consented, may bring suit against the third party after paying compensation to his employee; (2) the employer may demand a credit or set-off when the injured employee seeks compensation after making a settlement with the third party.[5]

The majority view in the former situation holds that the employer is required to establish the third party's liability and cannot use the fact of the third party's settlement as either a presumption or evidence of guilt.[6] The rationale is that amicable settlements should be encouraged and should not operate to the disadvantage of the third party. The third party may nevertheless be required to pay damages to the employer despite the settlement if the employer can sustain the burden.[7] It is the third party's failure to obtain the employer's consent to the settlement which brings about this result.[8]

In a few jurisdictions the third party who makes an unauthorized settlement will be liable to the employer up to the amount of the settlement solely upon the showing by the employer that such settlement has been made.[9] If, however, the employer desires to recover an additional sum, which will be the case when the settlement is less than the compensation liability, he must then prove the third party's legal liability.[10] The rationale of this position is that any settlement is for the benefit of the employer who is entitled to indemnification to the extent of his own liability for compensation; both the employee who has received the settlement and the third party who made the settlement must answer to the employer for that amount. This minority position is patently inconsistent. If the employer seeks to recover more than the amount of the settlement, he must prove a legal liability which has already been presumed in order

[5] If the employee made a settlement after receiving compensation, the employer can proceed against the employee or his estate for reimbursement. This was permitted in an Illinois case where the employer's non-negligence and the third party's negligence were tacitly presumed. In re Estate of Shields, 320 Ill. App. 522, 51 N.E. 2d 816 (1943).

[6] Whitney v. Louisville & N.R. Co., 296 Ky. 381, 177 S.W. 2d 139 (1944); U.S. Fidelity & Guaranty Co. v. New York, N.H. & H.R. Co., 101 Conn. 200, 125 Atl. 875 (1924); Broderick v. Great Lakes Casualty Co., 152 Pa. Super. Ct. 449, 33 A. 2d 653 (1943); Southern Surety Co. of New York v. Chicago, R.I. & P.R. Co., 215 Iowa 525, 245 N.W. 864 (1932); Lloyd Adams, Inc. v. Liberty Mutual Ins. Co., 190 Ga. 633, 10 S.E. 2d 46 (1940).

[7] On the question of the amount of damages which can be recovered see 19 A.L.R. 790 (1922).

[8] Under the typical statute, a settlement does not bind the employer unless he has consented to it. Ill. Rev. Stat. (1945) c. 48, § 166.

[9] Traders & Gen. Ins. Co. v. West Texas Utilities Co., 140 Tex. 57, 165 S.W. 2d 713 (1942); Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828 (Tex. Civ. App., 1944); Western Md. R. Co. v. Employer's Liability Assur. Corp., 163 Md. 97, 161 Atl. 5 (1932).

[10] Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828 (Tex. Civ. App., 1944); Western Md. R. Co. v. Employers' Liability Assur. Corp., 163 Md. 97, 161 Atl. 5 (1932).

that he might obtain at least the amount of the settlement. The absurd result of this position was recognized by a Texas court in a recent decision, which held, nevertheless, that recovery up to the amount of the settlement was statutory, despite the fact that the Texas act also requires legal liability in the third party.[11] However, if this result is held to be required by statute, there is some question whether such a statute is constitutional. The Georgia Workmen's Compensation Act, which had the usual requirement that there be legal liability in the third party before a credit would be allowed, was amended so that the employer could recover by merely showing that a payment had been made. This amendment was held a deprivation of the third party's property without due process of law.[12]

In the second situation in which the problem of the effect of a settlement arises—the employer's claim for a credit in the employee's action for compensation after a settlement—two views can be found in the decisions. One view, consistent with the majority view in the former situation, holds that the employer must prove the third party's liability before he will be allowed the credit, and that the settlement is not evidence of liability.[13] The other position holds that the employee is precluded from denying the liability of the third party from whom he has accepted a settlement, on the theory that the employee's release to the third party presumes liability.[14] This latter rationale is clearly inconsistent with the majority position in the action between the employer and the third party, yet two states which hold that in that situation the settlement will not even be evidence of liability here hold that the settlement is conclusive evidence of liability.[15] The encouragement of amicable settlements which motivated the courts when the action was between the employer and the third party requires the same result when the action is between the employer and the employee. An employee might make a smaller settlement to avoid what might be a longer but more compensatory litigation had he pursued his action to judgment,

[11] Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828, 830 (Tex. Civ. App., 1944). "We therefore have a case wherein the insurance carrier is entitled to no cake at all by reason of any alleged negligent act on the part of the railway company, yet is being presented with a portion of the cake because the railway company saw fit to buy its peace from the employee." Ibid., at 831.

[12] Lloyd Adams, Inc. v. Liberty Mutual Ins. Co., 190 Ga. 633, 10 S.E. 2d 46 (1940). This result was noted with approval in Broderick v. Great Lakes Casualty Co., 152 Pa. Super. Ct. 449, 33 A. 2d 653 (1943).

[13] Renner v. Model Laundry, Cleaning & Dyeing Co., 191 Iowa 1288, 184 N.W. 611 (1921); Disbrow v. Deering Implement Co., 233 Iowa 380, 9 N.W. 2d 378 (1943).

[14] Rosenbaum v. Hartford News Co., 92 Conn. 398, 103 Atl. 120 (1918); Whitney Transfer Co. v. McFarland, 283 Ky. 200, 138 S.W. 2d 972 (1940); Tews v. Hanks Coal Co., 267 Mich. 466, 255 N.W. 227 (1934).

[15] Connecticut and Kentucky. Cf. Rosenbaum v. Hartford News Co., 92 Conn. 398, 103 Atl. 120 (1918), and U.S. Fidelity & Guaranty Co. v. New York, N.H. & H.R. Co., 101 Conn. 200, 125 Atl. 875 (1924); Whitney Transfer Co. v. McFarland, 283 Ky. 200, 138 S.W. 2d 972 (1940), and Whitney v. Louisville & N.R. Co., 296 Ky. 381, 177 S.W. 2d 139 (1944).

for the same reasons that a third party might make a relatively costly settlement to avoid a similarly lengthy but less expensive litigation had he resisted the employee's claim.

There is, indeed, a valid reason for treating the effect of the settlement differently depending on whether the employer seeks a credit from his employee or recovery from a third party, but that reason is not given by any of the courts. The successful maintenance of a suit by the employer against the third party would require double payment by the third party, and, although this will and should be allowed when the third party has been negligent, it would be unreasonable to hold the fact of one payment as evidence in establishing the necessity of another payment. Although the third party has been careless in not obtaining the employer's consent to the settlement, the third party should not bear a burden beyond being subject to an action by the employer. When the employee resists the employer's demand for a credit, however, the employee is seeking something like double recovery. It is not unreasonable to require the employee to prove that the settlement is really a donation or an act of charity before he shall be permitted to have both the settlement and the compensation. It is unfair, however, to deny to the employee the opportunity of proof, as has been done by the courts which hold that the acceptance of a settlement by the employee assumes the third party's liability. Treating the settlement as a rebuttable presumption of liability in the third party[16] when the employer seeks a credit in the employee's action for compensation is desirable for many reasons. It does not distort the plain language of the statute; it recognizes the desirability in encouraging settlements; and it promotes the policy which is opposed to double recovery[17] by shifting a difficult burden of proof from the employer—which the instant case implies he must bear[18]—to the employee. It permits the employee to gain the advantage of a donation, but short of that he must indemnify his employer from whom he is claiming or has claimed compensation.

[16] This approach has been suggested in an analogous situation in a recent Virginia case. Stone v. Helme, 37 S.E. 2d 70 (Va., 1946). Virginia, like a number of states, gives the employee an election when there is liability in the third party. He can either get compensation or proceed against the third party. The plaintiff contended that the third party was not liable, and hence the plaintiff did not give up his compensation remedy by accepting a settlement from a nonnegligent third party. The settlement was held to be prima facie evidence of the third party's negligence, and it was held that the employee would have to sustain the burden of proving that the third party from whom he had received a settlement was nonnegligent. But cf. Renner v. Model Laundry, Cleaning & Dyeing Co., 191 Iowa 1288, 184 N.W. 611 (1921), where this approach was explicitly rejected.

[17] The court in the instant case indicated that this was one of the purposes of Sec. 29 of the Illinois Workmen's Compensation Act, F. K. Ketler v. Industrial Com'n, 65 N.E. 2d 359, 362 (Ill., 1946).

[18] It is not clear from the report of the instant case how the issue of the third party's nonnegligence was established. At the hearing before the arbitrator the employer introduced a copy of the widow's complaint in her action against the railroad and a letter from her attorney to the employer notifying him that she was claiming compensation and was also proceeding against the railroad, but would drop the compensation claim if the railroad suit was successful.

BOOK REVIEWS

Real Estate Law. By Robert Kratovil. New York: Prentice-Hall, Inc., 1946. Pp. xxiii, 349. $4.50.

Primarily written to help businessmen and brokers understand real estate law, Robert Kratovil's book has much to recommend it to lawyers. Through a careful selection of material, the more important legal rules governing real estate law are set forth in an extremely short and compact work. General rules of law, stated in terms understandable to one unfamiliar with legal terminology, are followed by concise illustrations.

Any book on real estate law, written for both layman and lawyer, must be in part unsatisfactory. The use of terms understandable to the businessman leads to unnecessary circumlocution. A premium is placed on simplicity at the expense of precision. Numerous definitions of words common to lawyers prevent the work from being as compact as otherwise would be possible. These definitions, however, may be scanned by the lawyer, and if read carefully by the nonlawyer should prove highly valuable to an understanding of real estate law.

The author has covered the more important practical aspects of real estate law which are common to most general textbooks on the subject. In addition, he has included chapters on "Loan Insurance under the National Housing Act" and "Rent Control," which are sufficient to give the layman a basic understanding of some of the problems to be encountered. Certain portions of this work, however, are of little value to either the initiate or uninitiate. While the layman may feel that the opening chapter on the "Sources of Real Estate Law" is longer than necessary, the lawyer undoubtedly will feel that its treatment in two pages leaves something to be desired. There is more than one chapter of this nature which will not materially enrich the lawyer's knowledge. They are, however, few in number. For most practicing lawyers this book will afford a very readable review of the law which they once learned and have possibly forgotten.

Kratovil has avoided the theoretical aspects of real estate law and has stressed its practical application to the buying and selling of property. A lawyer or real estate broker closing his first sale will find the chapter on the "Consummation of a Real Estate Sale" of inestimable value. The convenient listing of items to be attended to is a valued reminder lest some detail be overlooked, only to arise at a later date to delay or annoy. Expenses to be prorated on closing, such as coal, insurance, janitor and scavenger services are of such a mundane character that most lawyers have emerged from their legal education with their minds unsullied. An insufficient understanding of these necessary actions may often prove of more immediate embarrassment to a lawyer than will an inability to remember the rule in Shelley's case.

Kratovil has tried to cover the more important legal rules of real estate in all states. This is unfortunate and is one of the primary disadvantages of the work. If a businessman or broker is able to master the general legal principles of his own state, he should probably be well satisfied. It is a mistake to attempt to cover, even cursorily, the law of

more than one state in a work of this size. Certainly a discussion of the Maryland and Pennsylvania ground rent systems is of little interest to the normal businessman.

As a direct result of the attempt to cover all states in this work, the lawyer will find that it is not a valuable aid in finding the case law. This will be particularly true for the practitioner in a state other than Illinois, as the great majority of the citations are to Illinois cases. Even the Illinois lawyer will be often discouraged when a point in question is discussed and the citation following is to a California, Texas, or Kansas decision.

The material in this book has been well organized and clearly presented. A complete table of contents and a thorough job of indexing make it a valuable reference book. The obviously painstaking work which has gone to make a complex subject more understandable to business men has been well spent.

EDWARD W. SAUNDERS*

The International Secretariat; A Great Experiment in International Administration. By Egon Ranshofen-Wertheimer. Washington: Carnegie Endowment for International Peace, 1945. Pp. 500. $4.50.

The United Nations can succeed only if it is able to attract the loyalty of the peoples of the world. National patriotism in every country must give way to United Nations patriotism if the international organization can be expected to act effectively when the peace of the world is endangered.

It is the Secretariat of the United Nations and those of the "specialized agencies" which are best fitted to build this all essential feeling in the hearts of men. The Assembly and the Security Council are composed of national members. The secretariats alone of the divisions of the United Nations will take a purely world view. Their secretaries general and their international staffs will be the symbols of world unity. The secretariats will furnish services not only to nations but to individuals. Through these services the United Nations can reach the peoples of the world and gradually weave the emotional ties which are necessary for a world opinion.

It is thus of first importance to the future of the world that the secretariats function with the highest possible degree of efficiency. How can they best carry out their tasks? One guidepost of first importance will be past experience in international administration. Dr. Egon Ranshofen-Wertheimer has done the whole world a distinct service in writing the first book devoted exclusively to the administration of the League of Nations Secretariat, the world's first major experiment in this field. *The International Secretariat*, moreover, appeared in time to be at the disposal of those who laid the foundation of the United Nations Secretariat at the San Francisco and London conferences. The book is meant to be of practical value, for the author besides being a first-rate scholar is a former international civil servant. Dr. Ranshofen-Wertheimer has written with a high degree of objectivity (a quality, incidentally, of prime importance in an international administrator).

The inclusion of Russia and the United States at the start of the new world organization has perhaps obscured its similarity with the League. The Preparatory Commission, which drew up plans for the establishment of the Secretariat, drew heavily on League experience and indeed on the testimony of former League officials. *The International Secretariat* brings out clearly the League Secretariat's greatest administrative

* Member of the Illinois Bar.

triumph. The League gathered a group of extremely capable personnel of highly diverse nationality who were with few exceptions completely loyal to the ideals of the League. In addition the staff maintained a high "esprit de corps" while at times facing heart-breaking difficulties. The feasibility of a truly international civil service was thus established. The author, however, identifies certain deficiencies in League personnel administration, such as the difficulty of promotion, which it is hoped will not be repeated in the United Nations.

The success of the League's Secretariat was achieved primarily because of the quality of its personnel and in spite of its administrative structure and organization. Dr. Ranshofen-Wertheimer's keen eye has caught the primary failures. First among these was the failure of the secretaries general to assume their responsibility for positive administrative leadership. They were indeed all secretary and not at all generals. As an indirect result of this unfortunate abdication the Supervisory Commission was appointed by the Council and later by the Assembly. This body eventually "suggested and even dictated policies." Here was control without responsibility, a cardinal sin of administration. The faults of League administration are as important to know as are its successes and the United Nations administrators will be wiser for this knowledge.

The book goes into considerable detail on many aspects of League administration and it must be made clear that international administration is far more complicated than national and local administration. The experience of twenty-five years of international administration, albeit on a smaller scale and with a number of significant differences, is here at hand for the new international civil service. Dr. Ranshofen-Wertheimer has produced a volume which is of immediate importance and of lasting value.

WILLIAM C. ROGERS*

American Law of Veterans. By Robert T. Kimbrough and Judson B. Glen. Rochester: Lawyers Co-operative Publishing Co., 1946. Pp. xxii, 1277. $10.00.

The millions of men and women returning from the armed services present an imposing problem to the practicing attorney. While the percentage of veterans seeking the advice of counsel may be small, the actual number will be great. A probable result is that attorneys generally will be confronted with a wide variety of questions concerning a temporary practice in a field of law almost totally foreign to them. In addition, the bulk of the law relating to veterans is not contained in the standard reference materials but rather is to be found in scattered statutes and in a host of miscellaneous and obscure regulations, administrative decisions, pamphlets, and bulletins. In this connection, the present volume, being an encyclopedia of the rights and benefits of veterans, is both timely and invaluable. While other treatises are in preparation, the *American Law of Veterans* is the first comprehensive work of its kind to be made available.

On the whole, the coverage of the handbook is good. It extends to the rights and benefits of veterans of World War II and the procedures pertaining thereto. The volume does not purport to touch on the rights and legal problems of veterans of earlier wars and only incidentally does some of its material relate to the rights and options of those remaining in the service. The scope of the text can best be illustrated by men-

* Personnel Secretary, Public Administration Clearing House, and Visiting Instructor in Political Science, University of Chicago.

tioning some of the more important topics covered, such as claims, practice, and procedure before the Veterans' Administration, rights, duties, payments, and status upon release from service, employment rights and unemployment benefits, education and rehabilitation, loans, insurance, property and estates, pensions, hospitalization and retirement pay, and the Soldiers' and Sailors' Civil Relief Act. Generally the text material is clear and concise, comprehensive and well documented. Exceptions may be noted, however—the chapter on employment rights and benefits furnishing a ready example. There, an excellent discourse on civil service preferences is coupled with a brief treatment of veterans' re-employment rights, no mention being made of the perplexing problems involving unions and seniority. The urgent need for a work on the law of veterans may well have been an overriding factor in publishing a volume in which not every topic was fully developed. Pocket part supplementation is the obvious cure. On the other hand, the number of subjects covered is very great and although the complex problems are not treated in all instances, the basic law on every subject is given. By the very nature of the subject matter the book contains a good deal of material that is not particularly germane to the practice of law. The inclusion of advice on government life insurance, retirement pay, etc., gives the work a wider appeal than to the legal profession alone and in no way detracts from its value as an encyclopedia on the law of veterans.

Two excellent features of the volume must not be overlooked. The first is the detailed procedural guide found in every chapter. Sources of information, forms and their use, administrative bodies and their jurisdiction, and exact steps to be taken in realizing each right and obtaining each benefit are all clearly indicated in the body of the text. The second feature is an appendix, some four hundred pages in length, containing a collection of all federal statutes which relate to veterans' rights, veterans' regulations, a summary of the principal state laws pertaining to veterans, and a list of addresses of all offices and agencies connected with veterans. The inclusion of such material rounds out the handbook. They are valuable aids to an invaluable volume.

HORACE RUSSELL*

Some Reflections on Jurisprudence. By W. W. Buckland. Cambridge, England: University Press, 1945. Pp. viii, 118.

This little book expands slightly the substance of a course of lectures. Its author is Professor Emeritus at Civil Law in Cambridge University. His successive chapters represent, not the consecutive development of a single theme, but the application of a central point of view to a variety of topics connected, more or less closely, with the subject of jurisprudence.

If we define "philosophy" as largely critical reflection upon presuppositions and implications, the author's point of view is philosophical. Chapters i–iv and vi might well have been entitled "Prolegomena to Jurisprudence." They contain critical reflections upon recent and current philosophies of the nature and function of law, and determine the limitations of jurisprudence. The views of Kant, Spencer, Duguit, Krabbe, Kelsen, Jellinek, Stammler, and of many others are crisply summarized, cited, and evaluated, with a neat modern instance in each case to drive home the point of the

* Member of the Illinois Bar.

criticism. Chapters v, ix, and x fall more within the field of jurisprudence itself. They deal with such topics as "The Command Theory and Its Rivals," "Legal Sovereign and Political Sovereign," and "Some Legal Concepts," and contain, amongst other good things, an extremely clear exposition and refutation of the social contract theory. Here again abstractness is mitigated by reference (a) to specific authorities such as Austin, Vinogradoff, Sir E. Barker, and many others, and (b) to apposite concrete instances.

The author's standpoint is empirical, comparative, and historical. He excludes from jurisprudence (as far as possible for one himself living in a historical period) the encroachment of value-judgments from the fields of ethics and social and speculative philosophy, and would make of jurisprudence a dispassionate scientific study of phenomena which are actual rather than ideal. He warns that a good deal of what he says is regarded as heterodox, but claims that the points of view suggested are worth further consideration.

The book is exceptionally well written, and suggests the easy mastery of a well-trained legal mind on the bench. The reviewer can find no fault with the clearness, soundness, and indeed finality of the author's summing up. But the reader, on laying the book down after enjoying it, is inclined to wonder whether the *ex cathedra* finality, which is so impressive in its reference to history which is past, is not perhaps out of place when it refers to a history which is still in the making. The feeling persists that present-day writers (e.g., Mr. Harold Laski) who are tried and found wanting as authorities in the field of theory, may actually have more to do with the creation, by legislation, of the brave new world of the future than the author's analyses, however logically brilliant, indicate.

RUPERT C. LODGE*

Transportation under Two Masters. By Charles D. Drayton. Washington: The National Law Book Co., 1946. Pp. 375.

Except for personal attacks on the author of *Justice in Transportation* and on Judge Thurman Arnold, who contributed the introduction to that book, Mr. Drayton, in *Transportation under Two Masters*, merely repeats the ancient arguments of railroad propagandists who have contended that the railroads, because they are subject to regulation under the Interstate Commerce Act, should be exempt from the operation of the antitrust laws. Mr. Drayton considers the enforcement of the antitrust laws by the Department of Justice a molestation or interference with the functions of the Interstate Commerce Commission and an attempt to "take out of the hands of the Interstate Commerce Commission a large measure of authority vested in that body." Mr. Drayton inquires whether the public interest would be served by the "continuance of orderly regulation of our transportation system by the Interstate Commerce Commission" or whether that tribunal should be "superseded in its regulatory function by the Antitrust Division of the Department of Justice."[1] The assumption that regulated carriers cannot simultaneously be required to obey these two laws enacted by the Congress is the basic fallacy of his book.

Mr. Drayton would have the reader believe that the Sherman Antitrust Act was

* University of Manitoba.

[1] Pp. 3–5.

never intended to be applied to transportation and that when the Supreme Court reached the opposite conclusion in the *Trans-Missouri*[3] and *Joint Traffic Association*[3] cases, it committed a grievous error. He further asserts that because conditions today are different from those prevailing when the above cases were decided, the Sherman Act is no longer applicable to transportation companies. This is the burden of chapters ii and iii, wherein he restates the time-worn arguments of railroad lawyers in the two above-mentioned cases and the more current arguments of railroad lawyers in the pending antitrust suits, *United States v. Association of American Railroads*,[4] and *Georgia v. Pennsylvania Railroad*.[5] And in this connection members of the bar will be startled to learn that in Mr. Drayton's opinion the inaction of one House of Congress is sufficient to repeal a duly enacted statute! He reasons that because the Senate, in receiving a report made by the Interstate Commerce Commission pursuant to a Senate Resolution[6] authorizing an investigation of the Transcontinental Freight Bureau, took no further action, "this fact would seem to constitute a clear legislative recognition" that the operation of rate conferences, such as that described in the commission's report, did not constitute a restraint of trade or commerce.[7] Mr. Drayton conveniently overlooks the repeated refusals of Congress to enact legislation exempting such conferences from the antitrust laws.[8]

Notwithstanding this position, Mr. Drayton further on welcomes, indeed advocates, explicit legislative relief from the antitrust laws and hopefully predicts the passage of the Bulwinkle bill[9] designed to achieve that end.[10] Evincing further doubt as to the soundness of his interpretation of existing law, Mr. Drayton makes the startling pronouncement that ". . . . if the Supreme Court should under present conditions outlaw such [rate] conferences and actually bring them to an end it would result in chaos and there would arise such a hurricane of public indignation and protest as to inevitably sweep aside any such decision."[11] This is hardly a restrained statement from a member of the bar.

At this point, it becomes necessary to test Mr. Drayton's basic assumption in the light of recent decisions of the Supreme Court, a process he studiously avoids. On

[3] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[3] United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

[4] Civil Action No. 246, U.S. District Court for District of Nebraska, Lincoln Division.

[5] Original No. 11, in the Supreme Court of the United States. This is the substantive case, not to be confused with the hearing on jurisdiction reported as Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

[6] S. R. 194, 67th Cong. 2d Sess., passed Dec. 15, 1921.

[7] Pp. 51–52.

[8] First refusal, see 21 Cong. Rec. 4099, 4753, 5950, 5981, 6208, 6314 (1890); second refusal, see 1 Sharfman, The Interstate Commerce Commission 52 (1931); third refusal, see Hearings before House Committee on Judiciary on Trust Legislation, 63d Cong., 2d Sess. Vol. 2, at 1894 (1914), 51 Cong. Rec. 9582, 9285, 9286 (1914); S. Rep. 698, 63d Cong. 2d Sess., 46, 60 (1914); 51 Cong. Rec. 14028, 16264, 16344 (1914); fourth refusal, see Hearings before Senate Committee on S. 942, Regulation of Rate Bureaus, 78th Cong., 1st Sess. (1943). The Bulwinkle bill (H. R. 2536, 79th Cong., 1st Sess., 1946), now pending in Congress, is the fifth attempt to set aside the antitrust laws as applied to rate-making in transportation.

[9] H. R. 2536, 79th Cong., 1st Sess. (1946).

[10] P. 124.

[11] P. 100.

March 26, 1945, the Supreme Court in the *Georgia* case[12] reaffirmed its former holdings that carriers are subject to the antitrust laws and that, notwithstanding the provisions of the Interstate Commerce Act, "conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act." Further, the Court saw no conflict between those two acts of Congress. Indeed, the Court made it clear that the operation of the antitrust laws in the transportation field does not retard, hamper, or supersede regulatory processes, as Mr. Drayton would have the reader believe, but is definitely in aid thereof.

In thus expounding the meaning and purpose of the Sherman Act, as applied to transportation, the Court noted that there is an area of lawful collaboration among carriers in the making of joint rates. The Court said: "It is pointed out, however, that under § 1(4) of the Interstate Commerce Act . . . . it is 'the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto.' And it is noted that agreement among carriers is provided in the establishment of joint rates. § 6. That is true. But it would be a perversion of those sections to hold that they legalize a rate-fixing combination of the character alleged to exist here. The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature. We do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate. . . . ."[13]

Ignoring the Court's clear statement that there is a legitimate function for rate conferences within an area of lawful collaboration (a study of which would have been a real service), Mr. Drayton chooses to concentrate on fictitious issues, such as charging that the Department of Justice favors cutthroat competition or complete abolition of rate conferences, including those which are legitimate. An examination of the Supreme Court's decision shows that it has not struck down all rate conferences. They may be established by the carriers for legitimate purposes. Thus, it appears that there will be no "chaos" and no consequent need for creating a "hurricane" to sweep the Supreme Court from its high esteem in the hearts and minds of the American people.

What is the great issue here involved? Is it cutthroat competition versus regulated monopoly, as Mr. Drayton would have the readers believe? I do not think so. I believe that the overriding issue is whether private companies operating public transportation systems are to continue as pawns employed to perpetuate economic and financial power in the hands of a few powerful banking and business houses, or whether these transportation companies are to be operated by railroad owners and managers as private enterprises within the regulatory scheme established by Congress. Mr. Drayton completely submerges this great issue. There is only a slighting reference thereto on page 68 of his book. But this is the heart of the antitrust suits brought by the Government and by the State of Georgia, both of which receive cavalier treatment at the hands of Mr. Drayton.

Let us first consider the Government's antitrust suit. In this suit, the Government seeks to free the West and the nation from the domination of the traditional railroad bankers, J. P. Morgan and Company and Kuhn, Loeb and Company, and businessmen of related interests, which has been made possible through their control of our bas-

[12] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456 (1945).

[13] Ibid., at 457.

ic industry, transportation. Such control enables these banking and business interests to dominate substantially every industrial and commercial activity, since the character and cost of available transportation determine the life of communities and of whole states, permitting one industry to flourish and condemning another to decay, stimulating the development of some resources and leaving others untouched. The Government charges that this monopolistic control of transportation by a group primarily concerned with protecting industries and investments in the East, has been used to suppress the industrial development of the West, thereby hindering the growth of population in the West and curtailing its purchasing power. And by it all, the complaint charges, the conspirators have depressed the national economy. In broad outline, the state of Georgia's original suit in the Supreme Court charges a like conspiracy to hold the economy of Georgia and the South in a state of arrested development.

Involved in both of these suits are the activities of the Association of American Railroads, an organization which the Government charges J. P. Morgan and Company, or its predecessor, helped to form. One may search Mr. Drayton's book in vain for any condemnation of this gigantic conspiracy which responsible federal and state officials charge in the courts of the land against those who are the traditional rulers of our transportation systems.[14]

Mr. Drayton scorns the competitive ideal in transportation, for, he states, "Regulation is the antithesis of competition." He can find no support for this view in the decided cases, nor can he find support from those who truly believe in private enterprise in transportation. A few years ago, a man entered the railroad field with a determination that, at least so far as the system he represented was concerned, it should be freed from the monopolistic control of traditional railroad bankers. This man was Robert R. Young. Mr. Young and his associates, working with independent banking houses, determined to bring about competitive bidding in railroad securities. Their long fight was brought to a successful conclusion in 1944. The railroads, security holders, and the public have already been saved hundreds of millions of dollars through competitive bidding.[15] This group acted in other ways to advance competition in the railroad industry.[16]

The point is that there is at least one great force in the railroad field and a great force in the banking field that believes in the competitive ideal in transportation—an ideal that may yet save that basic industry for private enterprise.

Mr. Drayton treads on dangerous ground when he challenges the patriotism of those who do not agree with him. In the chapter entitled "Giving Aid and Comfort to Our Enemies," which, he indicates in a footnote, constitutes treason against the United States, Mr. Drayton refers to a paragraph which the author of *Justice in Transportation* quoted from the report of the Truman Committee. Upon the basis of having quoted this paragraph Mr. Drayton builds his inferences, without being deterred by

[14] It is not inappropriate to add that Governor Arnall of Georgia recently testified before the Senate Interstate Commerce Committee that he brought the Georgia suit with the encouragement of President Roosevelt.

[15] Hearings before Senate Committee on Interstate Commerce on S. 1253, Modification of Railroad Financial Structures, 79th Cong. 2d Sess., at 318–320 (1946).

[16] Ibid., at 321–23.

the fact that he is charging the President of the United States (who while vice president indorsed *Justice in Transportation*) with treason. I am less impressed than is Mr. Drayton with the patriotism of the monopolists in transportation. Five men, four of whom were taken from the rate-fixing conferences of the organized railroad industry, placed in uniform, and given the rank of major, were given the "duty" to agree upon the rates charged by the War Department by the railroads of the nation. The rates charged the War Department by the railroads during the war have been the subject of a recent investigation by a three-man committee of experts appointed by the executive office of the President, Bureau of the Budget. Its report has been submitted to the Department of Justice and to Congress for action. This report discloses that "the Government has not only paid excessive charges in a stupendous amount before and since Pearl Harbor, but it is still paying such excessive charges on presently moving traffic and will continue to pay them until appropriate action is taken to remedy this situation." The means and methods employed by the Association of American Railroads to further this far-from-patriotic situation were brought to light, at least in part, by testimony of Department of Justice representatives at current hearings of the Senate Committee on Interstate Commerce.

Mr. Drayton's assertion that the Antitrust Division of the Department of Justice sabotaged the war effort needs no defense at my hands. When the President established the Office of Defense Transportation, Attorney General Francis Biddle and Mr. Joseph B. Eastman agreed on an arrangement whereby carriers, upon receiving authority from that agency and the Department, might pool their services and facilities in the interest of the war effort. Mr. Eastman expressed the view that if such procedure had been available in World War I, it would not have been necessary for the Government then to take over the railroads. In the light of this fact it is preposterous for Mr. Drayton to assert that government ownership of all transportation agencies is the end now secretly sought by the Department of Justice.

The introduction by Luther M. Walter deserves comment because of the statement therein that "... there is no longer any need for the application of the principles of the Sherman Act to preserve competition among railroads." Mr. Walter, as trustee of the Chicago Great Western Railway Company and as a lawyer, has repeatedly appealed to the Antitrust Division of the Department of Justice to enforce the Sherman Act against the railroads. A notable instance was the antitrust proceeding resulting in a consent decree prohibiting the railroads of the United States from giving effect to an agreement whereby the Association of American Railroads forbade coordination of railroad and motor carriers. *Eheu, quantum mutatus ab illo.*

Mr. Drayton has missed a great opportunity to make a constructive case, if one can be made, for regulated monopoly in transportation against the concept advanced in *Justice in Transportation* of competition within the framework of regulatory laws. Instead he has chosen to offer the reader a hodge-podge of time-worn arguments, assertions, and inaccuracies, interlarded with invective. Much of the material can be found in a pamphlet written in 1945 by C. E. Johnston, Chairman, Western Association of Railway Executives, styled *Two Masters?*

ARNE C. WIPRUD*

* Member of the District of Columbia Bar, and author of *Justice in Transportation*.

The First Freedom. By Morris L. Ernst. New York: The Macmillan Co., 1946. Pp. xiv, 316. $3.00.

President Roosevelt defined the first of the four freedoms to be: "Freedom of speech and expression—everywhere in the world." Mr. Ernst's book is an analysis of the extent of the first freedom—here in the United States. The author subjects the press, radio, and movies in our own country to scrutiny from the standpoint of the constitutional premise that maximum liberty of expression is a necessary foundation of an enduring democratic structure. His conclusion is that monopolization in these fields of mass communication has reached such a state as to menace the free flow of ideas.

Mr. Ernst's book is in the Brandeis tradition. Its philosophy, as well as its style, stems from the late Justice. The danger which is to be most feared is monopolization of the media of expression. Bigness is the curse. The cure is to reverse the trend and to restore competition. The remedy for the ills of democracy is more democracy. To prove these basic tenets, Mr. Ernst has arrayed an impressive and startling body of facts.

Our newspapers proudly champion freedom of the press, even to the extent of futilely claiming exemption from the wage-and-hour and antitrust laws in the name of the first freedom. It would seem axiomatic that a free press presupposes a competitive one to insure a sufficiency of divergent opinion. Yet a competitive press is fast vanishing in the United States. In ten states there is not a single city with competing daily papers. In twenty-two states, Sunday newspaper competition has disappeared. One quarter of our total daily circulation is controlled by eighteen newspapers owned by fourteen companies. Three hundred and seventy chain newspapers own about one-fifth of all our circulation. One company dominates more than three thousand weeklies. In the entire country there are only one hundred and seventeen cities where competing dailies still survive.

But we have the radio. It is true that during the Roosevelt period, access to the radio tended to equalize the almost unanimous opposition of the press to the New Deal. Unfortunately, however, the trend toward monopolization has likewise embraced radio. One-third of all regular radio stations are interlocked with newspapers. Before the war, the four major networks had 95 per cent of all the desirable night-time broadcasting power. Eleven advertisers contribute about 50 per cent of all the network income. In more than one hundred areas, the only newspaper left owns the only radio station. Major Armstrong's great discovery of frequency modulation presented a golden opportunity to curb the cartelization of the radio industry and to restore freedom of the air to the people. Unfortunately, the Federal Communications Commission is not taking advantage of this last chance. More than 83 per cent of all applications for FM permits outstanding in October, 1944, were from the present operators of AM stations. The FCC has more or less adopted a policy of bestowing FM licenses upon present AM operators.

True, a few of the more enlightened labor unions have applied for FM licenses, driven to this course of action by the denial to labor of access to the radio for the presentation of its viewpoint. While this action of labor organizations is to be welcomed as insuring more diverse and, hence, more free expression and discussion of public issues on the air, nevertheless, it is safe to assume that the dominant position of the giant networks will not be thereby seriously challenged.

The most popular medium of communication of ideas is the movies. Yet, but five companies dominate the entire movie industry. They control the twenty-eight hundred key motion picture theatres of the nation. Two of these companies produce approxi-

mately 90 per cent of all our raw film stock. More than 75 per cent of the money paid by the American movie audience goes into the coffers of the Big Five. This concentration of power has given us unexcelled technical achievement in the field of the cinema, but also an inhibiting and unenlightened censorship and an end product intellectually and emotionally substandard.

The foregoing are some of the principal facts which Mr. Ernst forcibly and effectively presents in support of his thesis. He enlists popular support for the "Crusade Magnificent" for freedom from economic restraints on the minds and habits of our people, and appeals to the Congress to initiate this crusade.

Mr. Ernst recommends certain specific remedies. Ownership of radio and press should be divorced. Similarily, movie companies from radio and television. Theatre chains should be kept out of the movie production business, and the production companies forced to sell all their theatres. Networks should be required to make network programs available on equal terms to all stations and should not be permitted to own radio stations. Taxes of a chain-store type should be imposed on multiple ownership of newspapers, radio stations, and movies. Small enterprises in these fields should be encouraged by more favorable tax exemptions and greater mail subsidies in the case of newspapers. Most of these remedies require legislation; some the restoration of the antitrust division of the Department of Justice to the vigorous state enjoyed by it under Thurman Arnold.

Peculiarly enough, Mr. Ernst makes only a casual, and, on the whole, slighting reference to a much more widely discussed and controversial proposal designed to eliminate monopoly in the communication of ideas, namely a TVA of the air and of the press. The fact that it is a drastic suggestion does not excuse Mr. Ernst's failure to analyze this controversial proposal. It is the one weakness of this otherwise excellent book.

Mr. Ernst throughout many eventful years has made important and valuable contributions toward furthering the first freedom. His book bearing this name is the latest and perhaps the most important one.

ARTHUR J. GOLDBERG*

Toward a Democratic New Order. By David Bryn-Jones. Minneapolis: University of Minnesota Press, 1945. Pp. viii, 288. $3.50.

Professor Bryn-Jones's book is in three main divisions. Part I examines the theoretical structure of democracy. Part II reviews four basic concepts: liberty, equality, the rights of man, and fraternity. In Part III the author relates the democratic ideal to current problems of social equality, industry, nationality, world order, and international relations. The magnitude and number of the issues which the author has elected to discuss is somewhat breathtaking; the plan, however, is clear, and the presentation orderly. To the intent and scope of such a book no objection can be raised.

This reviewer, unfortunately, often finds himself unsympathetic to Professor Bryn-Jones' approach to his subject, dissatisfied with the statement of issues, unilluminated by the argument, and irritated by the rhetoric.

In dealing with so large an abstraction as democracy an author will be fortunate if he can give to his reader a coherent statement deriving from a single, well-defined point of view. Eclecticism will yield confusion, or—as with this book—induce apathy of the logical functions. In one place Bryn-Jones offers a moral basis for a judgment: "The

* Member of the Illinois Bar.

principle that might never makes right assumes that the state is a moral entity and that, like every other moral entity, it must find its justification in the end it serves."[1] In another place he advances the psychological axiom that "it has been assumed too readily that with people in general it is reason that decides; it is still more dangerous to assume that with masses of people judgments are always, or even generally, determined in the light of pure reason."[2] A third manner of approach is through historical analysis. After commenting upon the paradoxical fact that the Roman republic was an oligarchy, he observes that "the answer, at least in part, seems to be that the Roman people had neither the capacity nor the will for self-government."[3]

The fourth and least satisfactory approach is in a sense mystical; it rests upon the frequent assertion that democracy is fundamentally a faith. An unhappy choice leads to the selection of Wordsworth as the rhapsodist of such a faith; that poet's personal sense of democracy has long ago been discredited, and his exaltation of the private virtues of humble men is generally recognized as part of the canon for the denial of material justice.

Such a variety of approach establishes the author's tolerance, but the failure to take a fixed position is fatal to the emergence of a clear thesis.

The statement of issues is often equally defective. Bryn-Jones obviously belongs to the idealist school of political theorists. Harold Laski, on the contrary, believes that the prime fact about the state is its possession of the supreme coercive power. It is puzzling to find Bryn-Jones quoting Laski on three occasions, with approval, but without any indication of their fundamental disagreement. Throughout the book there are only vague allusions to the sharp oppositions which exist among modern writers on the state.

I have said that the argument is often unilluminating. The failure, in my opinion, lies in the author's tendency to develop his ideas through reiteration. A statement will be repeated time and again within a paragraph or a chapter, in different words but without noticeable progress either by analysis or extension. This critical opinion must of course be tested, and accepted or rejected, by the individual reader.

Professor Bryn-Jones' style is not diffuse but it is heavy with platitude. "In the fires of great trials the purposes of men are fused into a common spirit."[4] "Political experience comes slowly and its lessons must be learned over long periods and with difficulty."[5] "But dictators do not resign; they fall!"[6]

Toward a Democratic New Order is permeated by a fine sense of the potential worth of human nature and by an abiding hope that individually good men can create a just and wise government. The author deserves respect both for his tolerant discussion of international differences and for his indignant attack upon economic injustice. If virtuous impulse and a magnanimous spirit were the sole need in a book on democracy, there could be no quarrel with Professor Bryn-Jones. It is regrettable that his dialectic is in large measure naive and unskilled.

G. Louis Joughin*

[1] P. 82. [2] P. 38.

[3] P. 13. Consult Rostovtzeff, History of the Ancient World (1927), where a study of the elements which made up "the Roman people" solves the paradox without recourse to such nebulous ideas as "the capacity [or] the will for self-government." See Bryn-Jones, pp. 17, 70, and 125, for other dubious historical judgments on Rome and on the Weimar Republic.

[4] P. 48. [5] P. 272. [6] P. 50.

* Assistant Professor of English, University of Texas.

The Authoritative

VETERANS' BENEFITS

Laws · Constructions · Regulations

A Comprehensive and Authoritative Exposition of the Acts of Congress, the Judicial Constructions and the Administrative Regulations Defining the Rights and Benefits of Veterans

With Foreword by the Veterans' Administrator

GENERAL OMAR N. BRADLEY

Also in This Volume

STATE LAWS
RELATING TO VETERANS

A quick search guide to the Veterans' legislation in the different states

Over 1450 Pages · Bound in Pocket Part Supplementation Kept Up to Date

Published by
WEST PUBLISHING CO.
St. Paul 2, Minn.

For Sale by
BURDETTE SMITH CO.
Columbus 2, O.

Please mention the Ohio State Bar Association Report when answering advertisements

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 13 JUNE 1946 NUMBER 4

CONTENTS

FEPC—A CASE HISTORY IN PARLIAMENTARY MANEUVER 407
By Will Maslow

THE ENFORCEMENT OF COLLECTIVE LABOR AGREEMENTS BY ARBITRATION 445
By Charles O. Gregory

PARADOXES OF THE *ASSOCIATED PRESS* DECISION—A REPLY 471
By Howard Ellis

NOTES

Anti-discrimination Legislation and International Declarations as Evidence of Public Policy against Racial Restrictive Covenants 477

Legality of Wage Readjustment Plans under the Overtime Provision of the Fair Labor Standards Act 486

RECENT CASES

Jurisdiction—Review of Courts-Martial by Civil Courts, *Hicks v. Hiatt*, 64 F. Supp. 238 (Pa., 1946) 494

Personal Property—Possession—Finder's Right to Chattel Superior to Owner of Premises, *Hannah v. Peel*, [1945] K.B. 509 500

Sherman Antitrust Act—Patents—Legality of Cross-licensing Agreement between Owners of Complementary Patents Setting Prices at which Sublicensees Sell Patented Articles, *United States v. Line Material Co.*, 64 F. Supp. 970 (Wis., 1946) . 504

[Contents continued on following page]

THE LIBRARY OF THE
AUG 19 1946
UNIVERSITY OF ILLINOIS

Subscription Price, $2.00 a year Single copies, 75 cents
Foreign Subscriptions, $2.60; Canada and Newfoundland, $2.24 in American currency
Service for less than a full year, single-copy rate

Published four times yearly, in December, February, April, and June, by the University of Chicago Law School at The University of Chicago Press, 5750 Ellis Ave., Chicago 37, Illinois. Authorized agent: Cambridge University Press, London. Patrons are requested to make all remittances payable to THE UNIVERSITY OF CHICAGO LAW REVIEW in postal or express money orders or bank drafts.

Business correspondence should be addressed to the University of Chicago Press, 5750 Ellis Avenue, Chicago 37, Illinois.

Communications for the editors, manuscripts, and books for review should be addressed to the Editor-in-Chief, The University of Chicago Law Review, University of Chicago, Chicago 37, Illinois.

Entered as second-class matter January 7, 1944, at the post-office at Chicago, Illinois, under the Act of March 3, 1879.

Copyright 1946 by the University of Chicago

[PRINTED IN U.S.A.]

Taxation—Income Tax—Depreciation of Mortgaged Property in Computing Gain or Loss—Basis of Mortgaged Property, *Com'r v. Crane*, 153 F. 2d 504 (C.C.A. 2d, 1945) 510

Torts—Manufacturer's Liability—Intervening Negligence, *Ford Motor Co. v. Wagoner*, 192 S.W. 2d 840 (Tenn., 1946) 518

Workmen's Compensation—Evidence—Settlement between Third-Party and Employee as Evidence of Negligence in Collateral Suit, *Keller Co. v. Industrial Com'n*, 65 N.E. 2d 359 (Ill., 1946) 522

BOOK REVIEWS

Kratovil, REAL ESTATE LAW 527
By Edward W. Saunders

Ranshofen-Wertheimer, THE INTERNATIONAL SECRETARIAT; A GREAT EXPERIMENT IN INTERNATIONAL ADMINISTRATION 528
By William C. Rogers

Kimbrough and Glen, AMERICAN LAW OF VETERANS 529
By Horace Russell

Buckland, SOME REFLECTIONS ON JURISPRUDENCE 530
By Rupert C. Lodge

Drayton, TRANSPORTATION UNDER TWO MASTERS 531
By Arne C. Wiprud

Ernst, THE FIRST FREEDOM 536
By Arthur J. Goldberg

Bryn-Jones, TOWARD A DEMOCRATIC NEW ORDER 537
By G. Louis Joughin

The Penalty of Indifference

Neglect on the part of a lawyer to keep fully informed regarding cases or statutes on which he proposes to rely is all too often penalized by embarrassment and loss of prestige.

Under present conditions no one can compete successfully who overlooks the most efficient and economical way of keeping up to date and getting things done.

That's why Shepard's Citations is particularly important now. It not only increases your speed, cuts costs and insures accuracy, but it also brings every other legal publication up to date.

Subscribers to Shepard's Citations know from experience that the relatively small cost of this service is offset many times by the benefits derived.

They know that there is no other way of handling your citation problems so quickly and so satisfactorily. It gets things done. Omit Shepard's and you pay the Penalty of Indifference.

Shepard's Citations

The Frank Shepard Company
111 Eighth Avenue
New York 11. N. Y.

Copyright, 1946, by The Frank Shepard Company

SOME REFLECTIONS ON JURISPRUDENCE

by W. W. Buckland

CONTENTS: I. Jurisprudence and Legal Philosophy. II. Current Philosophies of Law and Positive Law. III. The Actual and the Ideal. IV. Jurisprudence Not a Philosophy. V. The Command Theory. VI. Particular and General Jurisprudence. VII. The State. VIII. Politics and Polities. IX. Legal Sovereign and Political Sovereign. X. Some Legal Concepts.

"The writings of Buckland are a delight because they contain pure reasoning and mature legal philosophy in a lucid style. Perhaps without intention, this book is background for straight thinking about legal concepts today. If you find no delight in pure reasoning and clear diction, a 'mystery story' will suit you better than Buckland's classic."—American Bar Association Journal

$1.75

LEGAL EFFECTS OF WAR

by Sir A. D. McNair

This is an analytical, historical and technical study which brings up-to-date the information on jurisprudence that is insufficiently known.

"This is the most useful working book we so far have, for the assistance of lawyers and courts, as to the legal effects of the war upon the rights of property and persons."—American Bar Association Journal $6.00

We are pleased to announce the inauguration of a new series, CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW, edited by H. C. Gutteridge, H. Lauterpacht, and Sir A. D. McNair. Three separate branches of the law will be treated: Public International Law, Private International Law and Comparative Law. The first volume which will appear in the series is COMPARATIVE LAW: An Introduction to the Comparative Method of Legal Study and Research by H. C. Gutteridge.

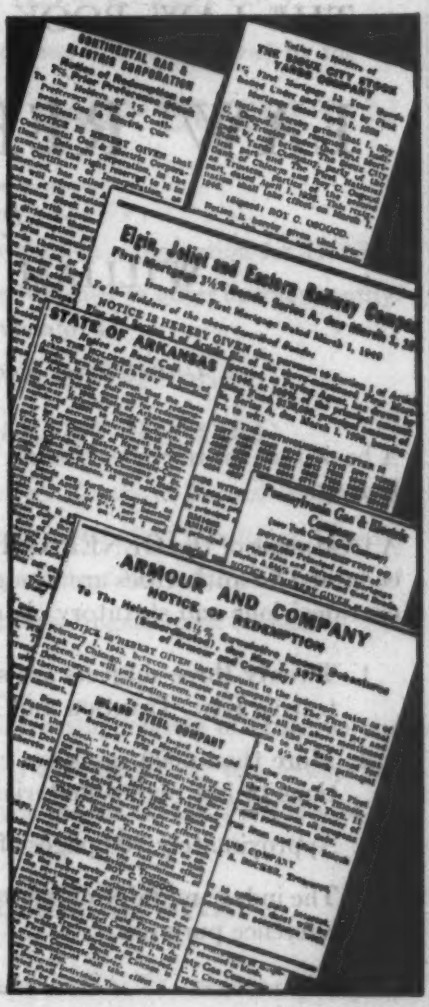
CAMBRIDGE UNIVERSITY PRESS

THE MACMILLAN COMPANY

60 Fifth Avenue, New York 11, N.Y.

Please mention the REVIEW when answering advertisements

FINANCIAL-LEGAL NOTICES



FOR RESULTS, the financial-legal notices you publish must reach an audience that's affected by what they have to say. Men of finance, commerce, business and industry . . . management men with whom such notices carry weight.

In 1945 the Chicago Journal of Commerce, for the 14th consecutive year, published more financial advertising including securities offerings than did any other newspaper in Chicago or the Central West. It carried the story direct to those who hold securities. Its financial readership was, and is, recognized by astute advertisers.

This daily business newspaper reaches that same audience with notices published in response to legal requirements. It is classified as a newspaper of general circulation, qualified in every way to publish legal notices of all types —corporate, state, municipal and federal. Place your legal notices in your most effective Central Western medium.

Chicago Journal of Commerce

12 E. Grand Avenue • Chicago 90, Illinois

ANNOUNCING

THE LAW BOOK OF THE YEAR!!!

LAW REFRESHER

by

WILLIAM E. BURBY

Professor of Law

University of Southern California

A basic text for refresher courses and a valuable adjunct to a law library.

A treatment of the GENERAL LAW, both substantive and procedural. Old authorities are brought up to date with the more recent decisions and statutory changes.

1. **Twenty-three subjects are summarized, including Administrative Law, Taxation and Labor Law.**
2. **More than 6000 cases are cited or discussed. Copious citations to law review material.**
3. **Approximately 900 pages of text and footnote material.**
4. **The index and table of cases add to the value of the book for reference purposes.**

Price: $25.00 · Immediate Delivery

PARKER & COMPANY

241 East Fourth Street **Los Angeles 13, California**

Please mention the REVIEW when answering advertisements

For more than

THREE GENERATIONS

the Attorneys of Chicago have been faithfully served by the

CHICAGO DAILY LAW BULLETIN

Throughout this period it has maintained a reputation for INTEGRITY that is unsurpassed by any newspaper or other business entity.

THE LAW BULLETIN and MUNICIPAL COURT RECORD

Accurately and Dependably cover all Courts of Record in Chicago every day; nearly one hundred courts, including Municipal, County, State and Federal. Consider for a moment the value of a service of this character to the courts, attorneys, litigants and citizens of this community.

Notwithstanding the constantly increasing volume of litigation and the greatly increased costs of every kind pertaining to a newspaper, the Law Bulletin is delivered to you for the SAME PRICE paid for it by attorneys

BEFORE THE CIVIL WAR.

If this continuity of SERVICE and LOYALTY means anything to you, direct every legal notice you control to the

CHICAGO DAILY LAW BULLETIN

34 NORTH LA SALLE STREET · TEL. CENTRAL 3245

It's Ready!

The 1946 SUPPLEMENT To

FEDERAL ESTATE AND GIFT TAXATION

by Randolph E. Paul

Supplement $12.50 ***Set and Supplement $32.50***

"Mr. Paul's Supplement performs all the functions of a Supplement. It has all the recent cases and developments in encyclopedic fashion. But it is more than a Supplement; it is really a book by itself. There is extensive new text discussion, including thorough treatment of the new provisions relating to powers of appointment and life insurance. And it is all done with the skill and penetration which have become hallmarks of Mr. Paul's work. Tax lawyers are again greatly indebted to him."

Erwin N. Griswold, *Harvard Law School*

For further information see your local law book dealer, or write to

Little, Brown & Co. **Boston, Mass.**

L B

Please mention the REVIEW when answering advertisements

The Newest Co-op Publication

AMERICAN LAW of VETERANS

...treating...

- BENEFITS
- PROCEDURE
- REGULATIONS
- RIGHTS
- STATUTES
- FORMS
- DIGEST OF STATE STATUTES

AN ENCYCLOPEDIC treatment of all the legal rights of veterans. -:- Here is a painstaking collection of statutes (down to January 1, 1946), regulations, Administrator's Decisions, and court decisions, which give the answers to all problems of veterans' law. -:- AMERICAN LAW OF VETERANS is a "how to do it" book, as well as an authoritative treatise. -:- Order your copy today while our limited supply lasts.

1,300 pages ***Price $10.00***

THE LAWYERS CO-OPERATIVE PUBLISHING CO.
Rochester 3, New York

Please send me your new encyclopedia,
AMERICAN LAW OF VETERANS.

Check method of payment
[ ] Price herewith $10.00.
[ ] Charge my account.
[ ] C. O. D.

Name.....
Street.....
City and State.....

THE NEW EDITION

of

KEEZER

on

MARRIAGE AND DIVORCE

Third Edition

A TRULY COMPLETE TREATISE

covering all phases of law governing marriage and divorce from qualifications to marry through alimony and custody, including special treatment of new topics, such as:

- **Insanity after marriage**
- **Divorce on ground of living separate and apart**
- **Enoch Arden laws**
- **Indignities**
- **Williams vs. North Carolina cases**
- **Discretionary causes**
- **Comparative rectitude**

One Large Volume . . . over 1,200 pages

With Forms . . . Price $15.00 delivered

THE BOBBS-MERRILL COMPANY

PUBLISHERS

Indianapolis 7, Indiana